

No. 13554

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United States  
Court of Appeals  
for the Ninth Circuit.

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GROVER C. SCHLAADT, SR., and GARFIELD  
SCHLAADT,

Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN,  
Husband and Wife; FRED JAHNKE and  
EMMA JAHNKE, Husband and Wife, and  
EMIL ZIMMERMAN as the Executor of the  
Last Will and Testament of JOHN HENRY  
KUCKS, Deceased,

Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
Eastern District of Washington,  
Northern Division.

RECEIVED

DEC 16 1952

PAUL P. O'BRIEN  
CLERK



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SCHLAADT,

Appellants,

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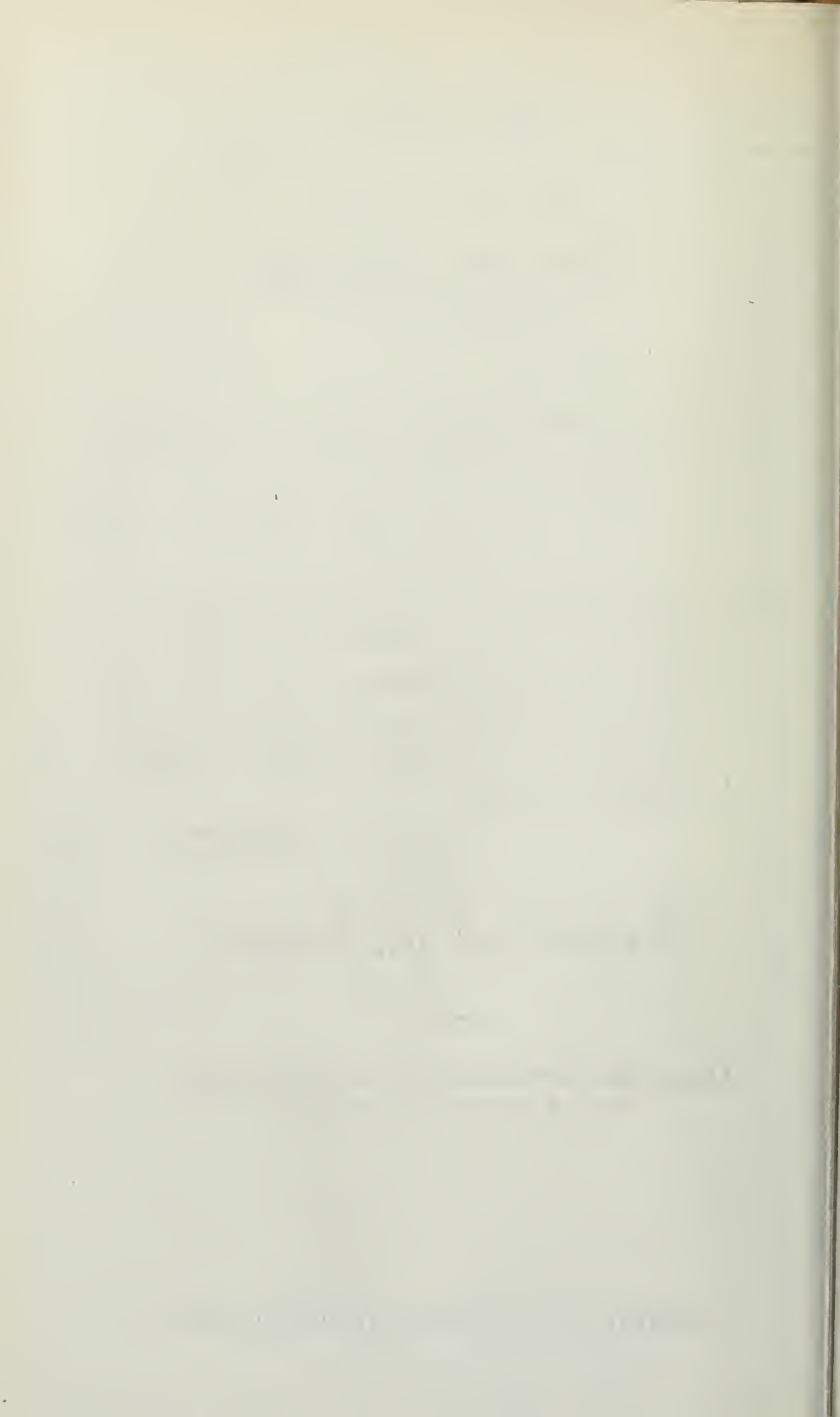
Appellees.

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Transcript of Record

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Appeal from the United States District Court for the  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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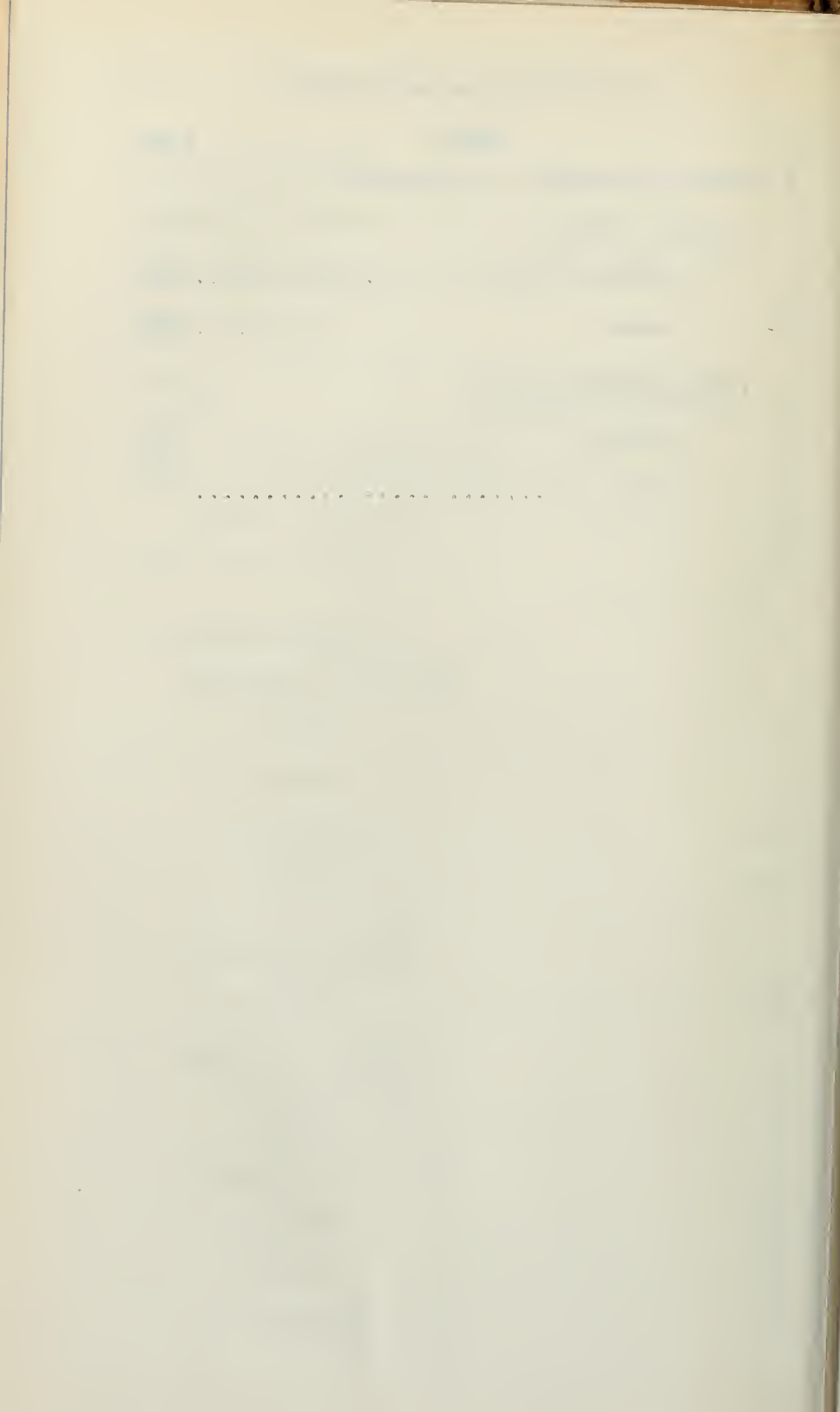
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NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD

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Spokane, Washington,

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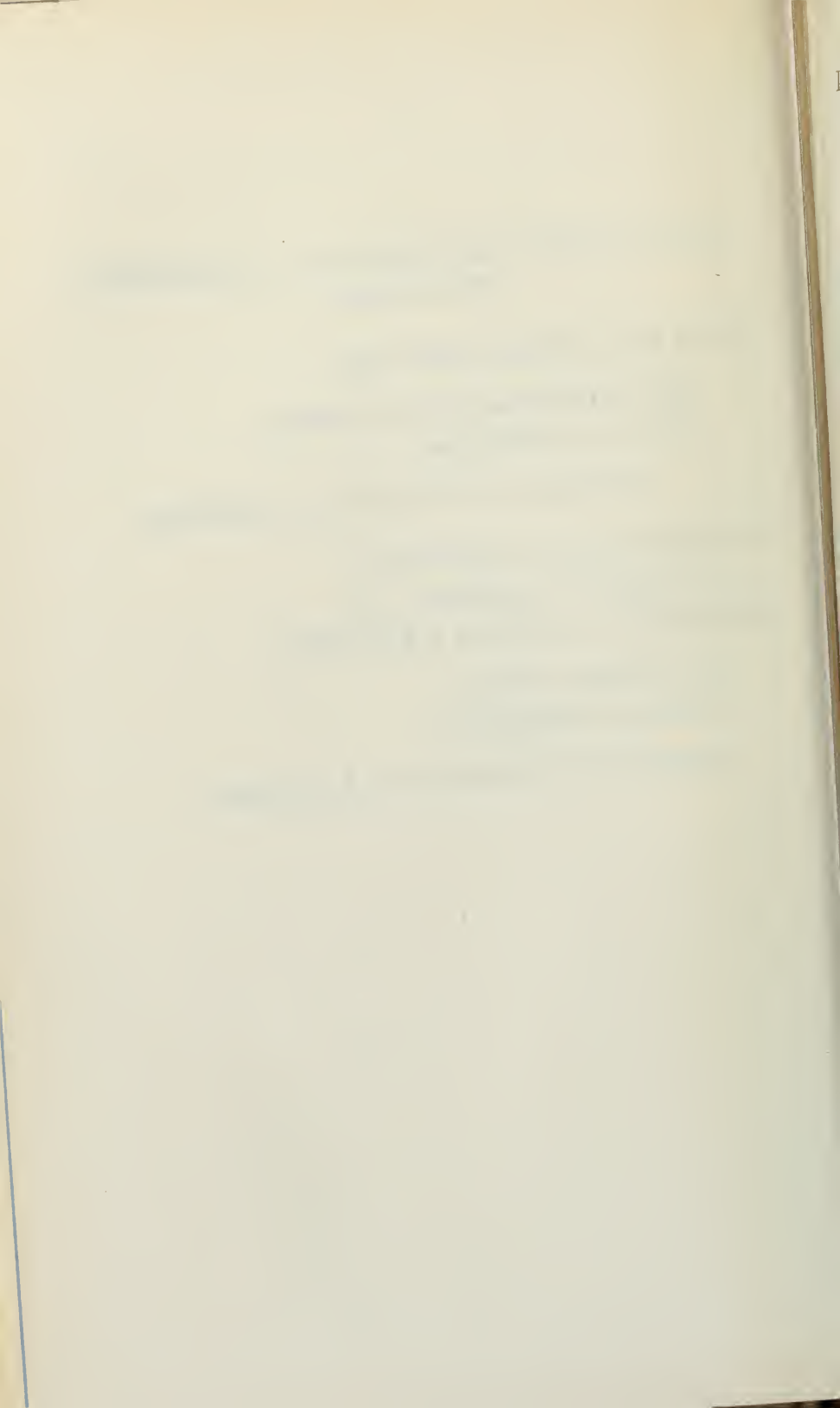
UNDERWOOD & CAMPBELL,

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915 Paulsen Building,  
Spokane, Washington,

Attorneys for Defendants and Appellees.



In the District Court of the United States for the  
Eastern District of Washington, Northern  
Division

Civil Action No. 992

GROVER C. SCHLAADT, SR., and GARFIELD  
SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN,  
Husband and Wife, FRED JAHNKE and  
EMMA JAHNKE, Husband and Wife, and  
EMIL ZIMMERMAN as the Executor of the  
Last Will and Testament of JOHN HENRY  
KUCKS, Deceased,

Defendants.

### COMPLAINT

Plaintiffs allege:

1. At all times herein mentioned plaintiff Grover C. Schlaadt, Sr., was and he is a citizen and resident of the state of Oregon. At all times herein mentioned Garfield Schlaadt was and he is a citizen and resident of the state of California. At all times herein mentioned, all of the defendants herein and each of them were and are citizens and residents of the state of Washington.

2. The amount in controversy herein exceeds, exclusive of interest or costs, the sum of \$3,000.

3. Catherina Schlaadt was the mother of the plaintiffs herein. In the month of June, 1944, Cath-

erina Schlaadt was a widow living in the city of Portland, Oregon, in a home of her own close to the home of plaintiff Grover C. Schlaadt, Sr. In the month of June, 1944, John Henry Kucks, a widower, visited Catherina Schlaadt, the mother of these plaintiffs, at her home in Portland and during that visit proposed marriage to her. Catherina Schlaadt having a nice home in Portland, Oregon, was reluctant to leave that home to take up her residence at Davenport, Washington, the home of John Henry Kucks, and as an inducement to Catherina Schlaadt to marry him John Henry Kucks orally solemnly promised Catherina Schlaadt that if she did marry him he would leave all of his property to her two sons, the plaintiffs herein, stating in that behalf that he had no children and no one else to whom he could leave it. Thereafter, having weighed the advantages and benefits to her sons of the promises so made by John Henry Kucks to leave all his property and estate to her two sons, Catherina Schlaadt agreed and promised to marry John Henry Kucks and on August 11, 1944, John Henry Kucks and Catherina Schlaadt were married at Vancouver, Washington.

4. Thereafter, Catherina Schlaadt Kucks was until her death a true and dutiful wife to John Henry Kucks and labored hard to keep their home and to provide for her husband, John Henry Kucks. In addition thereto Catherina Schlaadt Kucks expended substantial sums from her separate estate for furnishings and fixtures in the home of John Henry Kucks.

5. On January 4, 1946, Catherina Schlaadt Kucks died and her husband, John Henry Kucks, probated her estate and succeeded to all of her property rights both in Lincoln County, Washington, and in Multnomah County, Oregon, a large part of which she had owned prior to her marriage to John Henry Kucks.

6. Subsequent to the marriage of John Henry Kucks and Catherina Schlaadt the said John Henry Kucks repeatedly assured Catherina Schlaadt and others that he had made and executed his will naming as the sole beneficiaries of his estate the plaintiffs herein and further naming plaintiff Grover C. Schlaadt, Sr., as the executor therein.

7. Thereafter on August 27, 1949, John Henry Kucks, under the conditions and because of the influences hereinafter set forth, violated his promise and agreement made to his late wife, Catherina Schlaadt Kucks, by executing a new will by which he gave, devised and bequeathed all of his property and estate to the defendants herein, to Emil Zimmerman and Kate Zimmerman, husband and wife, an undivided one-half interest and to Fred Jahnke and Emma Jahnke, husband and wife, an undivided one-half interest, who were not related to him in any way. In said last will said John Henry Kucks did appoint Emil Zimmerman as executor of his last will and directed that the will be probated without the intervention of any court other than is required by the laws of the state of Washington

and likewise directed that his executor be not required to give bond as such.

8. At the time that John Henry Kucks, deceased, made his will of August 27, 1949, said decedent was 86 years of age, physically infirm, failing in memory and easily influenced. For a considerable time prior to August 27, 1949, defendants herein, Emil Zimmerman, Kate Zimmerman, Fred Jahnke and Emma Jahnke, well knowing the physical weaknesses of said John Henry Kucks and his property accumulations, with the intent and desire to secure for themselves the whole of the estate of said decedent, by wiles and artifices of professed friendship and solicitude for his welfare sought to induce said decedent to alter his will in their favor and thereby to breach his contract with his deceased wife, mother of these plaintiffs. By these wiles and artifices said defendants succeeded on August 27, 1949, in inducing John Henry Kucks in his then weakened and infirm condition to revoke his former will in favor of these plaintiffs and to leave the whole of his estate to the said defendants and thereby to breach his said contract with his deceased wife, mother of these plaintiffs, to leave his said estate to these plaintiffs.

9. Thereafter, on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereafter, such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed on August 27, 1949, was duly admitted to probate. Defendant Emil Zimmerman received let-

ters testamentary from the Superior Court of the State of Washington for Lincoln County authorizing him to act as executor of said last will and ever since said date said Emil Zimmerman has been and he is the duly appointed, qualified and acting executor of the Estate of John Henry Kucks, deceased.

10. Thereafter, such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks was duly filed and property therein listed was appraised as of the value of \$74,552.22.

Wherefore plaintiff prays:

1. That the said promise of John Henry Kucks to leave all of his property by his last will to these plaintiffs be specifically performed;

2. That the said defendants, and each of them, be adjudged to convey to these plaintiffs the whole of the estate of John Henry Kucks upon the conclusion of the probate of the Estate of John Henry Kucks, deceased, in the Superior Court of the State of Washington for Lincoln County.

3. That the said defendants, and each of them, be enjoined and restrained from converting any part of said estate to their own use, save only the probate fees of Emil Zimmerman that may be awarded to him by the said Superior Court as and for his services as such executor;

4. That the plaintiffs have such other and further relief as this court may deem just; and

5. That the plaintiffs have and recover their costs of and from defendants.

**GRAVES, KIZER & GRAVES,**  
By /s/ **J. W. GREENOUGH,**  
Attorneys for Plaintiffs.

[Endorsed]: Filed December 21, 1951.

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[Title of District Court and Cause.]

**MOTION TO DISMISS**

Come now the defendants above named and move the court as follows:

1. To dismiss the action because the complaint fails to state a claim against the defendants upon which relief can be granted.

2. To dismiss the action on the ground that the court lacks jurisdiction of the matter in controversy.

**UNDERWOOD AND  
CAMPBELL,  
HAMBLIN, GILBERT &  
BROOKE,**  
Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed January 8, 1952.



[Title of District Court and Cause.]

MOTION FOR LEAVE TO FILE  
AN AMENDED ANSWER

The defendants move the court for leave to file the attached amended answer in the above-entitled action. This motion is made pursuant to Rule 15 of Rules of Civil Procedure and on the records and files herein.

Done in open court June 10, 1952.

UNDERWOOD & CAMPBELL,  
HAMBLEN, GILBERT &  
BROOKE,  
/s/ PHILIP S. BROOKE,  
Attorneys for Defendants.

Service of Copy acknowledged.

[Endorsed]: Filed June 11, 1952.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR LEAVE  
TO AMEND COMPLAINT

Plaintiffs move that the court grant leave to plaintiffs to amend their complaint by substituting for the original paragraph 6 thereof the following:

“6. Subsequent to the marriage of Catherina Schlaadt and John Henry Kucks he executed his will dated May 24, 1945, pursuant to and in performance of the agreement above alleged, and after the death of Catherina Schlaadt executed his will dated February 11, 1946, pursuant to and in performance of said agreement. Subsequent to the marriage he repeatedly assured Catherina Schlaadt and others that he had made and executed his will pursuant to and in performance of said agreement.”

This motion is made pursuant to Rule 15 of Rules of Civil Procedure and is based upon the records and files herein.

Plaintiffs will bring the above motion on for hearing before the court at the United States Court House in Spokane on June 27, 1952, at 10 o'clock a.m.

Spokane, Washington, June 25, 1952.

GRAVES, KIZER & GRAVES,  
/s/ J. W. GREENOUGH,  
Attorneys for Plaintiffs.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 25, 1952.

[Title of District Court and Cause.]

MINUTE ENTRY JUNE 27, 1952, RE MOTION  
TO FILE AMENDED ANSWER

Present: Honorable Sam M. Driver,  
U. S. District Judge.

Now on this 27th day of June, 1952, this matter came on for hearing on Defendant's Motion for leave to file an amended answer, Plaintiff's Motion to strike Affirmative Defense, and Plaintiff's Motion to Amend Complaint. After argument by Mr. Brooke on behalf of defendant and by Mr. Kizer for plaintiff, Motion to Amend Answer Granted, and Plaintiff's Motion to Amend Complaint also Granted.

\* \* \*

Thereupon Court adjourned until Monday, June 30th, 1952, at 10 a.m.

Certified: A True Copy:

[Seal] /s/ STANLEY D. TAYLOR,  
Clerk U. S. District Court, Eastern District of  
Washington.

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[Title of District Court and Cause.]

**AMENDED ANSWER**

Defendants for answer to the complaint of the plaintiffs, admit, deny and allege as follows:

I.

Admit the allegations contained in paragraphs 1 and 2.

## II.

Answering paragraph 3, admit that Catherina Schlaadt was the mother of the plaintiffs herein, and during the month of June, 1944, was a widow living in the City of Portland, Oregon. That on August 11, 1944, John Henry Kucks and Catherina Schlaadt were married at Vancouver, Washington; and deny each and every other allegation, matter and thing contained in paragraph 3.

## III.

Defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4, and therefore deny the same.

## IV.

Answering paragraph V, admit that on June 4, 1946, Catherina Schlaadt died, and her husband John Henry Kucks succeeded to her property rights in Lincoln County, Washington; and deny the remaining allegations contained in said paragraph.

## V.

Answering paragraph VI, defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph VI, and therefore deny the same.

## VI.

Answering paragraph VII, admit that on August 27th, 1949, John Henry Kucks executed a will by

which he gave, devised and bequeathed all of his property and estate to the defendants herein, namely, Emil Zimmerman and Kate Zimmerman, husband and wife, an undivided one-half interest, and Fred Jahnke and Emma Jahnke, husband and wife, an undivided one-half interest, who were not related to him in any way, and appointed Emil Zimmerman as executor of his last will and testament, and directed that the will be probated without the intervention of the court other than as required by the laws of the State of Washington, and likewise directed that his executor be not required to give bond as such; and deny the remaining allegations contained in said paragraph.

#### VII.

Deny each and every allegation, matter and thing contained in paragraph VIII.

#### VIII.

Admit the allegations contained in paragraph IX and in paragraph X.

Further answering said complaint and for an affirmative defense thereto, defendants allege that the alleged contract that John Henry Kuecks would leave all of his property to her two sons, namely, Grover S. Schlaadt and Garfield Schlaadt, if he would marry the said Catherina Schlaadt, if made, is void and unenforceable under the Statute of Frauds of the State of Washington.

Wherefore, defendants having fully answered the

complaint of the plaintiff pray that said action be dismissed and that they do and will recover their costs and disbursements herein expended.

UNDERWOOD & CAMPBELL,  
HAMBLLEN, GILBERT &  
BROOKE.

/s/ PHILIP S. BROOKE,  
Attorneys for Defendants.

[Endorsed]: Filed June 30, 1952.

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[Title of District Court and Cause.]

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

This cause came on regularly for trial before the court sitting without a jury at Spokane, Washington, on June 30, 1952. The plaintiffs appeared in person and by their counsel B. H. Kizer and J. W. Greenough of Graves, Kizer & Graves. Defendants appeared in person and by their counsel Philip S. Brooke of Hamblen, Gilbert & Brooke and Floyd J. Underwood of Underwood & Campbell. Oral testimony and documentary evidence was introduced by the plaintiffs. At the conclusion thereof the defendants moved that the court enter an order dismissing said action with prejudice, challenged the sufficiency of the evidence to sustain any judgment in favor of plaintiffs and also renewed their motion to dismiss on the ground that the complaint failed to state a claim against the defendants upon

which relief could be granted. At the conclusion of argument of counsel the court, having announced its oral decision and being now fully advised in the premises, makes the following

### Findings of Fact

1. At all times mentioned in these findings plaintiff Grover C. Schlaadt, Sr., was and is a citizen and resident of the state of Oregon and plaintiff Garfield Schlaadt was and is a citizen and resident of the state of California. At all times in these findings mentioned all of the defendants in this cause were and are citizens and residents of the state of Washington.

2. The amount in controversy in this litigation exceeds, exclusive of interest or costs, the sum of \$3,000.

3. Catharina Schlaadt (after August 11, 1944, Catharina Schlaadt Kucks) was the mother of the plaintiffs herein. In the month of June, 1944, Catharina Schlaadt was a widow living in the city of Portland, Oregon. She had been a widow for ten years and lived in a large and well furnished home of her own built by her late husband for them in 1920. Her son Grover C. Schlaadt, Sr., lived on a farm 14 miles away but came into the city each day to work and two or three times each week brought with him his wife to spend the day with Catharina Schlaadt, then picking her up in the evening. In Portland lived her grandson Grover C. Schlaadt, Jr., his wife and Catharina Schlaadt's great grand-

son. In addition, she had a wide circle of friends and was happily circumstanced both as to relationships and as to living conditions.

4. For many years there had been an acquaintanceship or friendship between John Henry Kucks and his wife Ida Kucks, living at Davenport, Washington, and the Schlaadt family as herein described. In the month of June, 1944, John Henry Kucks, having recently become a widower through the death of his wife, visited Catharina Schlaadt at her home in Portland and there orally made her the proposition that if she would marry him he would leave upon his death all of his estate to her two sons Grover C. Schlaadt, Sr., and Garfield Schlaadt. Said proposition was made by him for the purpose of inducing Catharina Schlaadt to marry him. This promise was made by John Henry Kucks in good faith and without intent to defraud or deceive Mrs. Schlaadt.

5. The evidence adduced on behalf of the plaintiffs as to the making of this oral proposition or promise by John Henry Kucks to Catharina Schlaadt that if she would marry him he would leave the whole of his estate to her two sons Grover C. and Garfield Schlaadt is conclusive, definite, certain and beyond legitimate controversy. Further, this testimony on behalf of the plaintiffs finds corroboration in the subsequent conduct of John Henry Kucks in the making of the wills recited in paragraphs 9 and 11 herein.



6. The court finds that this proposition or promise was the special inducement that led this 76 year old woman in her comfortable circumstances to marry John Henry Kucks, then a man of 81 years of age, and that she would not have married him but for such promise. However, while the evidence is silent as to the purposes of John Henry Kucks, it is reasonably inferable that he entered into the marriage with the usual expectations entertained of marriage by a man of his age, hoping to have a wife to make and keep a home for him and to give him her care and companionship.

7. Thereafter, having weighed the advantages and benefits to her sons of the promise so made by John Henry Kucks to leave all of his property and estate to her two sons, and in consideration thereof, Catharina Schlaadt agreed and promised to marry John Henry Kucks and on August 11, 1944, John Henry Kucks and Catharina Schlaadt were married at Vancouver, Washington.

8. Relying on said promise of John Henry Kucks to leave his estate as aforesaid Catharina Schlaadt Kucks removed her personal belongings, including her furniture, dishes, and clothing, from her home at Portland, Oregon, to the home of John Henry Kucks at Davenport, Washington, and thereafter until her death Catharina Schlaadt Kucks resided at his home at Davenport, Washington, and was a dutiful wife to John Henry Kucks.

9. Thereafter on May 24, 1945, John Henry Kucks made and executed his last will by which

he left all of his property and estate to his "be-loved wife, Catharina Kucks," and appointed Catharina Kucks to be the executrix of his last will under the terms of a non-intervention will.

10. On January 4, 1946, Catharina Schlaadt Kucks died intestate, leaving as her only heirs at law plaintiffs and a daughter Florence Schlaadt, all issue of a former marriage, and her husband John Henry Kucks probated her estate and succeeded to all of her property rights in the state of Washington.

11. Thereafter on February 11, 1946, the said John Henry Kucks by his last will bequeathed in trust the sum of \$500 for Gary Handel (son of George Handel whom he and his wife Ida Kucks had brought up to manhood) with the provision that if he should die prior to reaching 21 years of age then the trustee should pay the amount thereof to the beneficiaries of his residuary estate. All the rest, residue and remainder of his estate by said last will John Henry Kucks gave, devised and bequeathed unto Grover C. Schlaadt an undivided  $\frac{2}{3}$  interest and unto Garfield Schlaadt an undivided  $\frac{1}{3}$  interest, stating that the said beneficiaries were the sons of his deceased wife Catharina Kucks. Furthermore, Grover C. Schlaadt, one of the plaintiffs herein, was made executor of said last will under the terms of a non-intervention will under the laws of the state of Washington.

12. Thereafter on October 22, 1946, John Henry Kucks, then being of the age of 84 years, made

another will by which the whole of his estate was divided  $\frac{1}{3}$  to Garfield Schlaadt,  $\frac{1}{6}$  to Grover C. Schlaadt,  $\frac{1}{6}$  to the defendants Fred Jahnke and Emma Jahnke, husband and wife, and  $\frac{1}{3}$  to defendants Emil Zimmerman and Kate Zimmerman, husband and wife, and further appointed Emil Zimmerman as executor of his estate under the terms of a non-intervention will under the laws of the state of Washington.

13. Thereafter, on March 2, 1948, John Henry Kucks made and executed yet another will by which he bequeathed the balance of any money due him on his death from the sale of his land in Canada, which amounted approximately to \$15,000, to George Handel, whom he and his wife had brought up to manhood, and to Jerry Handel, infant son of George Handel, he bequeathed a Canadian liberty bond in the amount of \$1,000. All the rest, residue and remainder of his estate John Henry Kucks gave, devised and bequeathed an undivided  $\frac{1}{2}$  interest to defendants Fred Jahnke and Emma Jahnke, husband and wife; an undivided  $\frac{1}{2}$  interest to Emil Zimmerman and Kate Zimmerman, husband and wife, and appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

14. Thereafter on August 27, 1949, John Henry Kucks executed his fifth will by which he gave, devised and bequeathed the whole of his estate  $\frac{1}{2}$  thereof to defendants Emil Zimmerman and Kate Zimmerman and  $\frac{1}{2}$  thereof to defendants

Fred Jahnke and Emma Jahnke. By said will also he appointed Emil Zimmerman to be the executor of his last will under the terms of a non-intervention will under the laws of the state of Washington.

15. Thereafter on July 12, 1951, the said John Henry Kucks died in Lincoln County, Washington. Thereupon such proceedings were had that on July 17, 1951, the last will of John Henry Kucks executed as above recited on August 27, 1949, was duly admitted to probate in the superior court of the state of Washington for Lincoln County. Defendant Emil Zimmerman received letters testamentary from the said court authorizing him to act as executor of said last will and ever since said date defendant Emil Zimmerman has been and is the duly appointed, acting and qualified executor of the estate of John Henry Kucks, deceased.

16. Thereafter such further proceedings were had in said estate that an inventory of the real and personal property of said John Henry Kucks, deceased, was duly filed in the office of the clerk of the said court and property therein listed was duly appraised as of the value of \$74,552.22. The major portion of the property so inventoried and appraised consisted of real estate. The balance of approximately \$15,000 due from the sale of the land in Canada was not included in said inventory.

From the foregoing findings of fact the court draws its conclusions of law:

## Conclusions of Law

### I.

That the oral contract entered into by and between Catharina Schlaadt and John Henry Kucks during the month of June, 1944, by the terms of which the said John Henry Kucks agreed to leave his property to the plaintiffs in consideration of the said Catharina Schlaadt marrying him, was void and unenforcible under the statute of frauds of the state of Washington, and that neither the execution of the wills dated May 24th, 1945, and February 11th, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

### II.

That defendants are entitled to judgment against the plaintiffs dismissing the above-entitled action with prejudice together with their costs of suit.

Dated at Spokane, Washington, this 8th day of August, 1952.

/s/ SAM M. DRIVER,  
District Judge.

[Endorsed]: Filed August 8, 1952.

United States District Court, Eastern District  
of Washington, Northern Division

No. 992

GROVER C. SCHLAADT, SR., and GARFIELD  
SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN,  
Husband and Wife, FRED JAHNKE and  
EMMA JAHNKE, Husband and Wife, and  
EMIL ZLMMERMAN as the Executor of the  
Last Will and Testament of John Henry  
Kucks, Deceased,

Defendants.

### JUDGMENT

This cause having come on regularly for trial before the Hon. Sam M. Driver sitting without a jury at Spokane, Washington, on the 30th day of June, 1952; plaintiffs appearing in person and by their counsel Ben H. Kizer and J. W. Greenough, of Graves, Kizer & Graves, and defendants appearing in person and by their counsel of record Philip S. Brooke of Hamblen, Gilbert & Brooke, and Floyd J. Underwood of Underwood & Campbell; oral testimony and documentary evidence having been introduced by the plaintiffs and at the conclusion thereof the defendants having moved the court for an order dismissing said action with prejudice and having challenged the sufficiency of

the evidence to sustain any judgment in their favor and also renewed their action to dismiss because the complaint fails to state a claim against the defendants upon which relief could be granted, and at the conclusion of argument of counsel the court having announced its oral decision granting said motions and the court having made its findings of fact and conclusions of law, and being duly advised in the premises; now therefore, upon and because of said findings of fact and conclusions of law,

It is ordered, adjudged and decreed that the above-entitled action be and the same is hereby dismissed with prejudice because of the insufficiency of the evidence to a judgment in favor of the plaintiffs and the defendants do have and recover judgment against the plaintiffs for their costs of suit.

Done in open court this 8th day of August, 1952.

/s/ SAM M. DRIVER,  
District Judge.

[Endorsed]: Filed August 8, 1952.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF AP-  
PEALS UNDER RULE 73(b)

Notice is given that Grover C. Schlaadt, Sr., and Garfield Schlaadt, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in the above-entitled action on August 8, 1952.

Spokane, Washington, August 22, 1952.

/s/ BENJAMIN H. KIZER,  
/s/ JOSEPH W. GREENOUGH,  
GRAVES, KIZER & GRAVES,  
Attorneys for Plaintiffs.

Receipt of copy acknowledged.

[Endorsed]: Filed August 25, 1952.



[Title of District Court and Cause.]

### COST BOND ON APPEAL

Know All Men By These Presents:

That the undersigned, Grover C. Schlaadt, Sr., and Garfield Schlaadt, plaintiffs and appellants in the above-entitled action, as Principals, and Fireman's Fund Indemnity Company, a corporation organized under the laws of the State of California, and authorized to transact the business of surety in the State of Washington, as Surety, are held and firmly bound unto the above-named defendants and appellees, Emil Zimmerman and Kate Zimmerman, husband and wife, Fred Jahnke and Emma Jahnke, husband and wife, and Emil Zimmerman as the Executor of the last will and testament of John Henry Kucks, deceased, in the penal sum of Two Hundred Fifty Dollars (\$250.00), lawful money of the United States, for the payment of which well and truly to be made, the said Principals and the said Surety bind themselves, their heirs and personal representatives or successors jointly and severally, firmly by these presents.

Dated this 22nd day of August, 1952.

Whereas, on the 8th day of August, 1952, the above-entitled court rendered and entered a judgment or decree in the above-entitled cause in favor of the above-named defendants and appellees and against the above-named principals;

And Whereas, the said appellants feeling ag-

grieved by said judgment or decree and desiring to appeal from the same to the United States Court of Appeals for the Ninth Circuit and perfect said appeal by this bond.

Now, Therefore, the condition of the above obligation is such that if the said appellants will pay all costs if the appeal is dismissed or the judgment affirmed or all such costs that the appellate court may award if the judgment is modified not exceeding \$250, then this obligation shall be void, otherwise to remain in full force and effect.

/s/ GROVER C. SCHLAADT, SR.,  
/s/ GARFIELD SCHLAADT,

By GRAVES, KIZER & GRAVES,  
Attorneys for Plaintiffs and  
Appellants.

[Seal] FIREMAN'S FUND INDEMNITY COMPANY,

By /s/ E. B. MURRAY,  
Attorney in Fact.

Countersigned by:

FARMIN, ROTHROCK & PARROTT, INC.,

By /s/ WRAY D. FARMIN,  
Resident Agent, Spokane,  
Washington.

[Endorsed]: Filed August 25, 1952.

United States District Court, Eastern District of  
Washington, Northern Division

Civil No. 992

GROVER C. SCHLAADT, Sr., and GARFIELD  
SCHLAADT,

Plaintiffs,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN,  
Husband and Wife, FRED JAHNKE and  
EMMA JAHNKE, Husband and Wife, and  
EMIL ZIMMERMAN as the Executor of the  
Last Will and Testament of John Henry Kucks,  
Deceased,

Defendants.

## RECORD OF PROCEEDINGS AT THE TRIAL

Be It Remembered that the above-entitled cause came on for trial at Spokane, Washington, on Monday, June 30, 1952, before the Honorable Sam M. Driver, Judge of the above-entitled court, sitting without a jury, the plaintiffs being represented by Ben H. Kizer and J. W. Greenough, of Graves, Kizer & Graves, attorneys at law of Spokane, Washington, the defendants being represented by Floyd J. Underwood, of Underwood & Campbell, attorneys at law of Davenport, Washington, and Philip S. Brooke, of Hamblen, Gilbert & Brooke, attorneys at law, of Spokane, Washington. Whereupon, the following proceedings were had and done, to wit: [1\*]

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\*Page numbering appearing at foot of page of original Reporter's Transcript of Record.

Mr. Greenough: The plaintiffs are ready, your Honor.

Mr. Brooke: The defendants are ready.

The Court: All right. There are some matters that occurred to me here in connection with the arguments that we had last week. I'm not sure that we've made of record sufficiently definite disposition of the various matters that came up at that time. On the motion for leave to amend the answer, I think the record should show and the clerk's minutes should show if they do not do so already, that that motion is granted. The motion for leave to amend the complaint also is granted, then there was a motion, I'm not sure definite disposition was made, a motion to strike the affirmative defense of the answer, and that is denied.

Mr. Greenough: I believe technically it wasn't denied; your Honor just said he wouldn't hear argument on it at that time, but would settle it at the trial.

The Court: Well, I think the disposition of motions should be made before entry upon trial, and I'm denying it with the understanding that the issue raised on the motion is not decided definitely and will be considered at the proper time. Now, another thing that occurred to me, there was some discussion in the pre-trial conference about the matter of the allegation that undue influence had been exercised on the deceased by the defendants or someone in their behalf, and I recall that Mr. Brooke took the position that that was not [2] material, that the material thing was whether or not a contract had

been made, and now, of course, in the present state of the issues, whether or not it is enforceable under the statute of frauds, and I think the pre-trial order showed or there is a statement in the pre-trial order that the primary issue is whether or not a contract was made by John Henry Kucks and Catherina Schlaadt with reference to his making a will in favor of her children.

Now, while I still adhere to that position, I also stated that I would consider as admissible in evidence any evidence that had probative value as bearing on the issue of making the contract and on subsequent reflection it occurs to me that whether or not undue influence was exercised upon Henry Kucks to change his will in favor of these defendants might have a very important probative value on the matter of making the contract, and that is borne out, it seems to me, by the defendants' trial brief in which a case is cited to the effect that—let's see—I haven't the trial brief here; it's on my table in there. On page 4 of your trial brief is a case I wish to refer to, Mr. Brooke, if you have it.

Mr. Brooke: That the execution of the will is some evidence of the making of a contract, and also the making of a subsequent will——

The Court: Yes. The case that was cited was to the effect that where a will is made that would be in accordance with the [3] alleged contract, and then a subsequent will is made which revokes that one and makes a different disposition, that that is some evidence that there wasn't any contract in the first place, and of course we must assume until the con-

trary is shown that people are well-intentioned and that they're honest and honorable and straightforward, and that they intend and endeavor to carry out their contracts, and so it could be argued that, well, Mr. Kucks, it may be assumed, didn't make any such agreement as that, or he wouldn't have so lightly changed it, and of course, the answer to that, or one answer, would be that he wouldn't have if he hadn't been unduly influenced to do so. It seems to me if the question of making a subsequent will has evidentiary value, then the reason why he made it and that he was influenced unduly to make it would have probative value also.

Mr. Brooke: I have no objection to that. I don't know how long plaintiffs will take, but we might have to have a continuance until tomorrow morning to meet that issue.

The Court: Well, it wouldn't be a question of any continuance; I'm here for the duration.

Mr. Brooke: Well, I don't mean a continuance——

The Court: If you have to go over until tomorrow, I have set aside time for it; as a matter of fact this is the only case I have set before the 4th of July, although I hope the case won't last all week; if it runs over until tomorrow that [4] won't inconvenience me in any way. I had this thought, too; I don't know whether you had that in mind or not, but in all probability it seems to me that the plaintiffs' case will disclose all the pertinent facts on the question of whether this contract is enforceable un-

der the statute of frauds, so if that issue is to be determined in your favor, it could be done at the close of the plaintiffs' case. I don't know of anything you could bring in that would alter that situation. It will depend on whether it appears the contract is within the statute of frauds at the conclusion of the case.

Mr. Greenough: I'd like to be heard on the remarks of your Honor and counsel. Your Honor of course recalls that at pre-trial I vigorously defended our position that we were entitled to bring out this matter of undue influence which we claim brought about the revocation of the two early wills which recognized the contract, and the making of later wills which repudiated the contract. Mr. Brooke was vigorously opposed, in fact, more vigorously opposed, because your Honor went down his side of the fence as shown by the pre-trial order. As a consequence, Mr. Kizer and I had a discussion following pre-trial and we have completely abandoned that phase of the case. I'd like your Honor to know we have three, probably four witnesses whom we would call on that phase of the case, and we haven't interviewed them since pre-trial, or made any attempt to talk to them. I know one is not immediately available, and [5] we certainly couldn't get any of them here by tomorrow; if we're in court today, we couldn't begin to agree that we could interview them again and get them here. We have interviewed them, you understand, but get them up here in time to go ahead on that issue tomorrow. If I understand correctly your Honor's suggestion

that we might go ahead on the case as we have prepared it pursuant to the pre-trial order, and then defer the remainder of our case on the issue of the influence if at the conclusion of our case your Honor thinks it's necessary to put it in, I think that would be acceptable to us.

The Court: Well, I'm sorry to have misled in that respect. What I had in mind was that if no contract were made, it wouldn't make any difference whether undue influence was exercised or not; of course we all recognize that as true.

Mr. Greenough: Or if it were within the statute.

The Court: But I think the only thing the pre-trial order recites is that the primary issue is the making of the contract. As I recall, I did state, although I didn't have it specifically in mind, while I thought the primary issue was the making of the contract, but I certainly would let in everything that would have probative bearing on that issue, and both parties must have that in mind. Of course, the question of undue influence would have importance only in case I come to the conclusion after your other evidence is submitted that you haven't proven the making of an oral contract with the degree [6] of proof required. It is an extraordinary degree of proof, or at least most of the cases so hold, and if I come to the conclusion that you haven't established the making of the contract to the degree of proof required, then I think you might reasonably be given an opportunity to bring in the witnesses on undue influence. They're available so we wouldn't have to put it over until after the 4th of July?



Mr. Greenough: Well, if your Honor pleases, they were interviewed some time early in the preparation of the case, a considerable time before the pre-trial order came out. Following the pre-trial, and of course I want to say parenthetically that I read that pre-trial order and still do in the light of what was said at the pre-trial, and I remember Mr. Brooke's statement repeatedly that the only question was whether or not there was a contract made. If there was a contract made, he breached it; no question about it. That was the basis of the argument upon which the pre-trial order was made. Certainly it takes us completely by surprise.

The Court: These cases are a little extraordinary in this respect, there is considerable difficulty in proving whether or not a contract of this type was made, and that difficulty is aggravated by the fact that certain classes of witnesses who would normally be your best witnesses are disqualified under what a friend of mine in Waterville once described as a statute that prohibited having a conversation with a dead man, [7] 1211, I believe it was under the old system, but it is difficult to make proof, so that these matters that ordinarily wouldn't be too important take on more importance in a case of this kind, subsequent conduct of the parties and so on. I think at best it's only relevant in meeting the contention that the making of a subsequent will was evidence that there was no contract.

Mr. Greenough: I think I didn't complete my answer to your last question, I got off into a parenthetical remark; that is, in view of the pre-trial or-

der and the conference, we have made no attempt to interview these people, and where they are I don't know. Some of them are of course resident around Davenport, and there is one at least who is no longer resident there. We knew where she was at one time, but we haven't had our finger on her for a good many months, so we couldn't agree to an arbitrary statement of time for which the continuance should be made. If there is going to be a continuance to round up those witnesses, we'll do it with dispatch, all possible alacrity, but if we're to proceed and leave that issue open we're ready to go.

The Court: What do you say to that?

Mr. Brooke: I certainly wouldn't object to any reasonable continuance.

The Court: Well, all right, proceed, then.

Mr. Greenough: Your Honor, I'd like to pass up to your [8] Honor plaintiffs' trial brief. I have handed a copy of it to counsel for defendants.

The Court: All right. Proceed.

Mr. Greenough: May it please the Court, this action has been three times before you prior to calling it for trial today, once upon defendants' motion to dismiss and to make more definite and certain, second upon a pre-trial conference, and the third time on motion to amend the complaint and the answer, and motion to strike the affirmative defense of the plaintiffs' complaint. I recognize therefore the possibility that your Honor may be so sufficiently aware of the issues involved here that an opening statement isn't necessary. It would simply be a re-

cital of what we expect to prove by the witnesses, and we prefer to let them speak for themselves.

The Court: I don't believe it would be necessary unless you have something that you think should be brought to my attention that hasn't been brought out in the prior proceedings in the case.

Mr. Greenough: I think with what's before your Honor, your Honor is thoroughly conversant with the issues and generally familiar with what the evidence will be, at least on our side. Plaintiff's identification number 10 in the pre-trial order was a copy of the marriage certificate. We have, however, now secured the original certificate of marriage of Henry Kucks and Catherina Schlaadt, and we offer that as an [9] exhibit.

Mr. Brooke: No objection, your Honor.

The Court: I think we should keep the same numbering on those that were produced at the pre-trial conference, and this will be 10, then, and it will be admitted.

Mr. Greenough: The copy is in as 10; this will be a second one; should it be 10-A?

The Court: You may withdraw the copy, and this one will be substituted.

(Whereupon, Plaintiffs' Exhibit No. 10 for identification was admitted in evidence.)

## PLAINTIFFS' EXHIBIT No. 10

### Certificate of Marriage

State of Washington,  
County of Clark—ss.

I Hereby Certify, That on the 11th day of Au-

gust, in the year of our Lord, one thousand nine hundred and forty-four, at Vancouver, in the County and State aforesaid, I, the undersigned, a Justice of the Peace, by authority of a License bearing date the 11th day of August, A.D. 1944, and issued by the County Auditor of Clark County, Washington,

Did Join in Lawful Wedlock

at 2:30 o'clock p.m., Henry Kucks of the County of Lincoln, State of Washington, and Catherina Schlaadt of the County of Multnomah, State of Oregon.

In the presence of:

/s/ GROVER C. SCHLAADT,

/s/ MRS. ARLETHA SCHLAADT,

Witnesses.

/s/ PAUL ELWELL,

Name of Party Performing  
Marriage;

JUSTICE OF THE PEACE,

Official Station.

/s/ HENRY KUCKS,

Groom.

/s/ CATHARINA SCHLAADT,

Bride.

Note: This Certificate is to be given to contracting parties.

Admitted in evidence June 30, 1952.

Mr. Greenough: The same situation exists with respect to plaintiffs' identification number 4, which was a copy of the last will and testament of John Henry Kucks, dated May 24, 1945.

The Court: Well, suppose we treat that the same way, you produce the original and we'll release the copy.

Mr. Greenough: Very well, and I invite the Court's attention to the fact that with this last will and testament there is the envelope in which it was enclosed when it was taken from the safe deposit box after Mr. Kucks' death.

The Court: Have you examined the envelope, Mr. Brooke?

Mr. Brooke: No.

Mr. Greenough: Mr. Underwood handed it, I think, to one of our clients.

Mr. Brooke: We have no objection. [10]

The Court: It will be admitted, then. Suppose we just clip the envelope on, and we'll call it all one exhibit.

(Whereupon, Plaintiffs' Exhibit No. 4 for identification was admitted in evidence.)

#### PLAINTIFFS' EXHIBIT No. 4

Last Will and Testament of John Henry Kucks

This Is To Certify that I, John Henry Kucks, of Lincoln County, State of Washington, being of sound and disposing mind and memory and over the age of twenty-one years, considering the uncertainty

of life, do hereby make, publish and declare this as and for my Last Will and Testament, that is to say:

**First:** I hereby revoke all former wills by me made.

**Second:** I direct that my body be decently buried with proper regard to my station and condition in life.

**Third:** I hereby direct that my executrix, hereinafter named, shall pay all my debts as soon as she has sufficient money with which to do the same.

**Fourth:** I hereby state that I have no children.

**Fifth:** I hereby give, devise and bequeath all of my property, of every kind and nature, both personal and real, or mixed, possessed by me at the time of my death, to my beloved wife, Catharina Kucks, to be her sole and separate property, forever.

**Sixth:** I hereby nominate and appoint my wife, Catharina Kucks, the executrix of this my Last Will and Testament, to serve as such without bond and without the intervention of any court.

In Testimony Whereof, I have hereunto set my hand and seal this 24th day of May, 1945.

/s/ JOHN HENRY KUCKS.

This Instrument, consisting of two pages, was on the date hereof by the said John Henry Kucks signed, sealed, published as and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the

presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

/s/ AMY LOUGHBON,

Address: Davenport, Washington.

/s/ LOIS McKEE,

Address: Davenport, Washington.

/s/ FLOYD J. UNDERWOOD,

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

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Mr. Greenough: Plaintiffs' identification number 5 at the pre-trial was a copy of the last will and testament of John Henry Kucks, dated February 11, 1946. That is already in the clerk's possession; I assume it's not necessary to tender another copy of that, your Honor.

The Court: You haven't the original of that one?

Mr. Greenough: No, we do not.

The Court: All right, that will be admitted, then.

(Whereupon, Plaintiffs' Exhibit No. 5 for identification was admitted in evidence.)

#### PLAINTIFFS' EXHIBIT No. 5

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of the age of eighty-three years, and

being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds on hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than \$1500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath, in trust, to Grover C. Schlaadt, the sum of Five Hundred (\$500.00) Dollars for Gary Handel, the same to be paid to him when he becomes twenty-one years of age, together with any interest which may accumulate on the the same, provided however, that in the event the said Gary Handel dies prior to arriving at the age of twenty-one years, I then direct said trustee to pay said money to the beneficiaries named in the residuary clause of this my Last Will and Testament.

Fifth: I hereby give, devise and bequeath unto Grover C. Schlaadt an undivided two-thirds interest and unto Garfield L. Schlaadt an undivided one-



third interest in and to all the rest, residue and remainder of my property of every kind, nature and description, wheresoever the same may be situated. I hereby state that the said Grover C. Schlaadt and Garfield L. Schlaadt are the sons of my deceased wife, Catharina Kucks.

Sixth: I further direct that each beneficiary under this, my Last Will and Testament, shall pay all inheritance taxes due from him to the State of Washington by reason of said bequest.

Seventh: I hereby nominate and appoint Grover C. Schlaadt the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 11th day of February, 1946.

.....

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

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Mr. Greenough: May I invite your attention to the fact that the preamble of that will recites that John Henry Kucks at the time of its execution was of the age of 83 years. That may become pertinent during the trial.

The Court: What date was that?

Mr. Greenough: February 11, 1946. It shows a recital of his age as 83. Plaintiff's identification number 6 in the pre-trial order is a copy of the last will and testament of John Henry Kucks dated October 22, 1946. I will offer that in evidence.

The Court: It will be admitted. That's the same document [11] that's been marked already.

(Whereupon, Plaintiffs' Exhibit No. 6 for identification was admitted in evidence.)

#### PLAINTIFFS' EXHIBIT No. 6

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of the age of eighty-four years, and being of sound and disposing mind and memory and

not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds on hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than \$1500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To Garfield L. Schlaadt, son of my deceased wife, Catharina Kucks, an undivided one-third interest;

To Grover C. Schlaadt, son of my deceased wife, Catharina Kucks, an undivided one-sixth interest;

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-sixth interest;

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-third interest, together with all the rest, residue and remainder;

Fifth: I further direct that each beneficiary

under this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal and published and declared this to be my Last Will and Testament on this 22nd day of October, 1946.

.....

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence, and in the presence of each other, have hereunto subscribed our names as witnesses thereto.

Witness:

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: And your Honor will observe that this recital states Mr. Kucks was at the time of its execution 84 years of age.

The Court: That was a year later, was it?

Mr. Greenough: Yes, the will was a year later—well, about ten months later, and it shows one year more of age.

The Court: October 22, 1946?

Mr. Greenough: 84 then.

The Court: All right.

Mr. Greenough: Plaintiffs' identification number 7 in the pre-trial order is a copy of the last will and testament of John Henry Kucks dated March 2, 1948. We offer that in evidence.

The Court: Is that number 7?

Mr. Greenough: Yes.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 7 for identification was admitted in evidence.)

#### PLAINTIFFS' EXHIBIT No. 7

Last Will and Testament of John Henry Kucks

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of legal age, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former Wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds in hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than \$1,500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To George Handel of Seattle, Washington, the boy whom I raised, I give the balance of any money due me on my death from the sale of my land in Canada, which I have at this time sold on contract.

To Jerry Handel, son of George Handel, I give a Canadian Liberty Bond, which I now own, in the amount of \$1,000.00.

All the rest, residue and remainder of my property, of every kind, nature and description, I hereby give, devise and bequeath as follows:

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest, and

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest.

Fifth: I further direct that each beneficiary un-

der this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 2nd day of March, 1948.

.....

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

FLOYD J. UNDERWOOD,

Address: Davenport, Washington.

AMY LAUGHBON,

Address: Davenport, Washington.

.....

Address: Davenport, Washington.

Admitted in evidence June 30, 1952.

Mr. Greenough: In the pre-trial order, plaintiffs' identification number 8 is a copy of the last will and testament of John Henry Kucks, dated August 27, 1949. Plaintiffs offer that identification as an exhibit. [12]

The Court: That will be admitted.

The Clerk: I don't have 8 here.

The Court: Wait just a moment, here. Oh, I can understand Miss Hardin's difficulty; there's a note in the pre-trial order that says identifications 8, 9 and 10 are reserved, being documents which are to be supplied later, so we do not have them.

Mr. Greenough: Well, now, then, I'm going to hand up to Miss Hardin, the clerk, your Honor, plaintiffs' identification number 8, which is a copy of the last will and testament of John Henry Kucks, dated August 27, 1949.

The Court: All right.

Mr. Greenough: Your Honor will observe that this is a copy certified by the clerk of the Superior Court of the State of Washington, that being the will which was in effect at the time of Mr. Kucks' death and which was probated in the Lincoln County Superior Court:

The Court: Well, let Mr. Brooke examine it.

Mr. Brooke: No objection.

The Court: It will be admitted.

(Whereupon, Plaintiffs' Exhibit No. 8 for identification was admitted in evidence.)



PLAINTIFFS' EXHIBIT No. 8

Last Will and Testament of John Henry Kucks

No. 5355

Know All Men By These Presents, That I, John Henry Kucks, of Davenport, Lincoln County, Washington, being of legal age, and being of sound and disposing mind and memory and not acting under duress, menace, fraud or the undue influence of any person or persons whomsoever, and being mindful of the uncertainties of life, do hereby make, publish and declare the following to be my Last Will and Testament, hereby revoking all former Wills by me made.

First: I direct that all my debts be paid by my executor hereinafter named as soon as he shall have sufficient funds in hand to do the same.

Second: I direct that my body be buried, in a metal vault, in my family plot in the Lutheran Cemetery at Davenport, Washington, and I direct that my executor hereinafter named shall expend not less than \$1,500.00 for my funeral expenses.

Third: I hereby state that I am a widower, and I have no living children, nor the descendants of any deceased children.

Fourth: I hereby give, devise and bequeath the property of my estate as follows, to wit:

To Emil Zimmerman and Kate Zimmerman, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest, and

To Fred Jahnke and Emma Jahnke, husband and wife, or the survivor, of Davenport, Washington, an undivided one-half interest.

Fifth: I further direct that each beneficiary under this, my Last Will and Testament, shall pay all inheritance taxes due from him by reason of said bequest.

Sixth: I hereby nominate and appoint Emil Zimmerman the executor of this my Last Will and Testament, and direct that this Will be probated without the intervention of any court other than is required by the laws of the State of Washington. I further direct that my executor be not required to give bond as such.

In Witness Whereof, I have hereunto set my hand and seal, and published and declared this to be my Last Will and Testament on this 27th day of August, 1949.

JOHN HENRY KUCKS.

This Instrument, consisting of two pages, including this one, was on the date hereof by the said John Henry Kucks signed, sealed, published as, and declared by him to be his Last Will and Testament in the presence of us, who at his request and in his presence and in the presence of each other have hereunto subscribed our names as witnesses thereto.

Witness:

W. L. CAMPBELL,

Address: Davenport, Wash.

FLOYD UNDERWOOD,

Address: Davenport, Wash.

In the Superior Court of the State of Washington  
for Lincoln County

No. 5355

In the Matter of the Estate of  
JOHN HENRY KUCKS, Deceased.

CLERK'S CERTIFICATE OF TRUE COPY

State of Washington,  
County of Lincoln—ss.

I, Margaret Scott, County Clerk and Clerk of the Superior Court of the State of Washington, for Lincoln County, do hereby certify that the above and foregoing is a true and correct copy of the Last Will and Testament in the above-entitled cause, as the same appears of record and on file in my office.

In Testimony Whereof I have hereunto set my hand and affixed the seal of the said Superior Court this 1st day of September, 1951.

[Seal]                    MARGARET SCOTT,  
                                 Clerk,

By /s/ SARA CLINTON,  
                                 Deputy.

Admitted in evidence June 30, 1952.

Mr. Greenough: Plaintiffs' identification number 9 was a copy of the marriage license. We don't see any materiality in that, since we have the certificate, so we're not offering it, [13] your Honor.

The Court: Very well.

### GROVER C. SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenough:

Q. Will you state your full name, Mr. Schlaadt?

A. Grover Cleveland Schlaadt.

Mr. Greenough: And I think I may make this suggestion, your Honor, to court and counsel; there are a good many Schlaadts on our side of the case, including a senior and a junior. If there is no objection from the witnesses themselves or from the court or counsel, it might be convenient to refer to some of these people by their first names instead of Mr. Schlaadt, or their full name, and I may do that, I may refer to Grover as Grover Senior, and his son, who will testify, as Grover Junior.

Q. Where do you reside, Mr. Schlaadt?

A. Portland, Oregon.

The Court: This is Mr. Grover Schlaadt Senior, I assume?

Mr. Greenough: This is Mr. Grover Schlaadt Senior, your Honor.

The Court: All right, go ahead.

(Testimony of Grover C. Schlaadt.)

Q. Do you live in the city of Portland?

A. I do. [14]

Q. Proper, or nearby?

A. In the city proper.

Q. Do you live in a residence or on a farm?

A. I live in a residence.

Q. Now, how long have you lived in Portland,

Mr. Schlaadt?           A. Since 1912.

Q. How old are you, Mr. Schlaadt?

A. 61 this month.

Q. And are you married?           A. I am.

Q. And what is your wife's name?

A. Arletha M.

Q. She is present in court, is she not?

A. She is.

Q. Mr. Schlaadt, we will be concerned a good deal in this action with dates in 1944. Were you a resident of Portland at that time?

A. I was.

Q. Did you then reside in the city limits, in the residence in which you now reside?

A. Not then.

Q. Where did you reside in 1944?

A. I lived on a farm just on the outskirts of Portland.

Q. About how far out of Portland?

A. Fourteen miles. [15]

Q. And were you then married?

A. I was.

Q. To Arletha?           A. That's right.

Q. What relative are you of Catherina Schlaadt?

(Testimony of Grover C. Schlaadt.)

A. She is my mother.

Q. She later married Henry Kucks and became Mrs. Catherina Kucks?      A. That's right.

Q. Do you have any children, Mr. Schlaadt?

A. I have two.

Q. Daughters, or sons?      A. Sons.

Q. What are their names?

A. There's Grover Junior, and William R.

Q. Are they in the courtroom today?

A. Well, Grover is here.

Q. Grover, Junior, is here?      A. Yes.

Q. Is your other son living?      A. Yes, sir.

Q. Where is he, Mr. Schlaadt?

A. He's in the Roseburg Hospital.

Q. The Roseburg Veterans Hospital by virtue of what circumstance, Mr. Schlaadt? [16]

A. He was wounded.

Q. Well, he was wounded in the second World War, was he?      A. Yes.

Q. And he's been in that hospital practically almost the entire time since then, hasn't he? You can just answer yes or no to that.

A. Not all the time. We take him home, and have to take him back.

Q. Mr. Schlaadt, are you employed in Portland now?      A. No.

Q. Were you employed in 1944?      A. Yes.

Q. Where did your mother Catherina reside in 1944?

A. She lived on View Point avenue, in Portland.

Q. And what was her age in 1944?

(Testimony of Grover C. Schlaadt.)

A. I think about 76, I believe, something like that.

Q. She was a widow at that time?

A. She was.

The Court: What was that date in 1944, you say?

Mr. Greenough: I'm just speaking of 1944 generally.

The Court: I see; she was 76 then.

Q. How long had your mother been a widow at that time, that is, in 1944 how long had she been a widow?

A. About ten years.

Q. Had your mother been married more than once at that time? [17]

A. No.

Q. Your father was deceased, was he, at that time?

A. Yes.

Q. Now, you've given us the address at which she resided in Portland, Mr. Schlaadt. Did she own that residence?

A. She did.

Q. Just give the Court a brief description of the residence as to size.

A. It was a large eight room house; it was a nice house, well furnished.

Q. How long had she lived there in that house?

A. They built the house about 1920.

Q. And she had lived there continuously until 1944?

A. That's right.

Q. And did your mother during those years and particularly in 1944 have friends in the neighborhood and in Portland generally?

A. She had lots of friends in the neighborhood, and used to go to these coffee klatches, they called

(Testimony of Grover C. Schlaadt.)

them, a German bunch used to get together; she went out there quite often.

Q. So far as you observed, or so far as anything your mother said to you, was she contented and happy in her surroundings there in Portland?

A. She was.

Q. Did your mother own property in Portland other than the [18] house which you've described?

A. There was two lots on the same house there, a smaller house there.

Q. You mean two houses on the same lot?

A. That's right.

Q. The other house was smaller?

A. Yes, a four room house.

Q. Did she rent that?           A. She did.

Q. Now, in 1944, where did you work in Portland, Mr. Schlaadt?

A. I worked for the Iron Fireman machine shop.

Q. And where is that situated with reference to the home in which your mother lived?

A. It's about a mile north on the same street, only a different name, it's Front Street, and up where they are it's View Point. There's a hill there, and after you go over the hill it's called Front Street. It angles to the river.

Q. Did you go past or at least pass near your mother's house en route from your farm approximately fourteen miles out of Portland to your employment at the Iron Fireman machine shop?

A. It was on the way, and within a block of there all the time, and then sometimes I'd stop there



(Testimony of Grover C. Schlaadt.)

and take the wife in, two or three times a week. [19]

Q. When you say you stopped to take the wife in two or three times a week, you mean your wife would drive in from the farm, and you'd drop her off at your mother's house?

A. That's right, I left her off there, and they used to go to shop, and I don't know just where they went.

The Court: Your place was out about fourteen miles?

A. Yes, we were west of there, and I'd come in straight on the road.

Q. It didn't involve any detour?

A. She used to come down to the bank, it was about a block walk. If I had time I'd make the loop and take her up there, and if I was late she'd walk.

The Court: What was the address of your mother's place?

A. 5004 Southwest View Point Terrace.

The Court: That's on the west side, isn't it?

A. That's on the west side. You come in from Beaverton onto Slaverton Road, and then right down to Front Street.

Q. On these occasions when your wife came in with you and you left her at your mother's home, how long would your wife stay there?

A. Until I picked her up evenings after work.

Q. You'd stop on your way home from work and pick her up?      A. That's right.

Q. How often did you say, on the average, that your wife went [20] in on these daily visits?

(Testimony of Grover C. Schlaadt.)

A. She went nearly every other day, and sometimes we'd go both Saturday and Sunday.

Q. But every other day during the work week itself, too?      A. Yes, that's right.

Q. Now, Mr. Schlaadt, do you recall a day in June, 1944, when, returning from your work and stopping at your mother's house to pick up your wife who had spent the day there, you found Henry Kucks there? Now, just answer that question yes or no.      A. Yes.

Q. Do you remember that occasion?

A. I do.

Q. What was the date of that as nearly as you can recall it, Mr. Schlaadt?

A. I didn't pay much attention. It was the latter part of June.

Q. Of what year?      A. Oh, 1944.

Q. Now, on that particular day had you left your wife there in the morning on your way to work?

A. I did.

Q. Now, on that particular morning, and I'm referring to this morning in the latter part of June, 1944, Mr. Schlaadt, had you gone into your mother's house when you [21] left your wife in the morning?

A. No, I never went in mornings, I always just left her off and went down to work.

Q. Now, did you go into your mother's house on that evening when you came to pick up your wife?

A. I sure did.

Q. Who was present when you went into the house?

(Testimony of Grover C. Schlaadt.)

A. My mother and my wife and Mr. Henry Kucks.

Q. You had known Mr. Kucks previously, had you not?      A. I had known Kucks since 1904.

Q. Was there a conversation—and don't tell me what it was—I'm just asking you if there was conversation on that occasion between you and Mr. Kucks?      A. There was conversation, yes.

Q. Was there conversation between you and your mother?      A. There was.

Q. And I take it, then, that generally the four of you who were present had a conversation between you all generally?      A. That we did.

Q. Now, what did your mother do and say on that occasion, Mr. Schlaadt?

Mr. Brooke: Just a moment. I wish to object to any statements made. Under section 1211 any statements made in the presence of Henry Kucks are barred, as well as any statements that Kucks made himself, so this would [22] be a statement made in his presence which comes under the statute. This man can't testify as to any statements made in his presence.

Mr. Greenough: Your Honor, I don't want to argue the matter at the moment, but I simply want to state to your Honor our theory. It's going to crop up continually through the case, as your Honor can anticipate. It is our theory that statements made by Mrs. Schlaadt, later Mrs. Catherina Kucks, to any of the witnesses, which indicate her state of mind or her motive for the marriage that later took

(Testimony of Grover C. Schlaadt.)

place, is admissible notwithstanding the hearsay rule, because that's not within the coverage of the hearsay rule, and also notwithstanding section 1211.

The Court: Well, of course that would be a different question if it were out of the presence of John Henry Kucks, but where he is present, there's always necessarily an implication that he has assented to what has been said in his presence, particularly if it's against his interest, and I would have a right to assume if she said, for instance, told her son "Mr. Kucks and I have decided to get married if he will devise all his property to you boys" and Kucks didn't say anything, that would be just the same as a conversation with Kucks, because I'd have to assume Kucks assented to it. While I haven't any authorities in mind, I don't know whether it's been passed on, [23] it seems to me it would come within the spirit of the statute.

Mr. Greenough: Permit me, your Honor please, to withdraw the question, at least at this time in the trial.

The Court: Yes.

Q. Do you know how long Mr. Kucks stayed in your mother's home on that occasion, on that visit, Mr. Schlaadt?

A. Just a few days the first time.

Q. Did your mother later go to visit Mr. Kucks at Davenport, Washington? A. She did.

Q. How long did she stay on that occasion?

A. Gone about ten days.

Q. Did you or your wife receive any communi-

(Testimony of Grover C. Schlaadt.)

cation from her, sent by her while she was at Davenport?  
A. My wife received a postcard.

Q. Did you see it?           A. I saw it.

Q. What did it say?

Mr. Brooke: Just a moment; I object to that, your Honor. It would be a self-serving declaration, and hearsay.

The Court: Well, it's not the best evidence, if the postcard is available. That's the first thing [24] that occurs to me.

Mr. Greenough: Well, if your Honor pleases, it isn't important. All the testimony in response to this question would be is that she gave the date of her expected arrival at home, and asked Mrs. Grover Schlaadt, Sr., to meet her at her home. It's purely preliminary.

The Court: Yes, all right.

Mr. Greenough: That is, when I say at her home, I mean at Catherina's home.

The Court: Well, we have in the record that they received a postcard. Do you desire more than that at this time?

Mr. Greenough: No, that's all that's necessary.

Q. Now, I don't expect you to remember the date of your mother's return to Portland, Mr. Schlaadt, but you are aware of the fact that she did return from Davenport, Washington, to Portland?

A. That's right.

Q. Did you take your wife to your mother's home on the morning of that day?

A. I took her there.

(Testimony of Grover C. Schlaadt.)

Q. Did your wife have a key which would admit her to your mother's home?

A. Yes, we had a key.

Q. And that evening en route home from work did you stop at [25] your mother's house to get your wife? A. I did.

Q. Who was present at that time?

A. Mr. Kucks, my mother, and my wife.

Q. Was Mr. Kucks there at that time? This is after your mother's return from Davenport.

A. When he come down, after her return?

Q. Your mother went to Davenport about ten days? A. Yes.

Q. And she then returned to Portland?

A. Yes.

Q. And your wife was there at her house the day she returned?

A. I took her to work, and she come there while I was at the job.

Q. Yes, but that evening after you got off the job you stopped there at her house? A. Yes.

Q. And your wife was there with her?

A. With my mother.

Q. And was Henry there at that time?

A. No, not at that time.

Q. I thought you were confused on that. Just the three of you, you and your wife and your mother? A. Yes.

Q. Now, what did your mother do and say on that occasion? [26]

(Testimony of Grover C. Schlaadt.)

Mr. Brooke: Just a minute; I object to that.

The Court: On what ground?

Mr. Brooke: On the ground that it's hearsay, any conversation had which was not in the presence of Henry Kucks or any of his representatives; self-serving declaration, also. It's a conversation he had with his mother.

Mr. Greenough: Well, I'll withdraw the question.

The Court: I beg your pardon?

Mr. Greenough: What's that?

The Court: What did you start to say?

Mr. Greenough: I'll withdraw the question at this time.

The Court: Very well.

Mr. Greenough: Of course, it may be necessary after some examination of Mr. Grover Schlaadt, Sr., to take him from the stand and later put him back on the stand.

The Court: Well, you may do that, yes.

Q. Was Henry Kucks later married to your mother?      A. He was.

Q. Where did the marriage occur?

A. In Vancouver, Washington.

Q. Did he come to Portland just prior to the wedding?

A. He come to Portland I think on the 7th of August.

Q. Of what year? [27]      A. 1944.

Q. 1944?      A. 1944.

Q. And where were they married?

A. Married at Vancouver, a justice of the peace.

(Testimony of Grover C. Schlaadt.)

Q. Vancouver, Washington?

A. Vancouver, Washington.

Q. And who, if you know, went with them to get their marriage license?

A. My wife went with them to get the license.

Q. Who, so far as you know, was present at the time of the wedding?

A. My wife was present, and I was present, and mother and Mr. Kucks, and the officers of the court there. I don't know how many there were.

Q. Now, was there that evening a wedding dinner at your mother's home?      A. There was.

Q. Do you recall who was present at that time, at that dinner?

A. My mother was there, Mr. Kucks was there, my son was there——

Q. Which son?      A. My son Grover.

Q. Junior?

A. Junior; and his wife was there. [28]

Q. His wife's name is Neva?

A. Neva; my wife was there, and I was there.

Q. Sometime subsequent to that, and while Mr. Kucks and your mother were still in Portland, did your son Grover, Jr., and his wife have them over for dinner?      A. They did.

Q. Were you present there at that dinner?

A. Yes.

Q. And was your wife?      A. Yes.

Q. Now then, Mr. Kucks and your mother eventually returned to his home at Davenport, Washington?      A. They did.



(Testimony of Grover C. Schlaadt.)

Q. How long did they stay in Portland after their marriage before they did return to Davenport?

A. I'd say probably five, six, seven days. They was packing her belongings.

Q. When you say her belongings, do you mean furniture and clothing?

A. Furniture and clothing, and some dishes she wanted to take along, keepsakes and the likes of that.

Q. When she moved to Vancouver with her new husband did your mother take the furniture and equipment from the house she had occupied all this time in Portland?

A. She took it on the lower floor. [29]

The Court: You said to Vancouver. You meant Davenport?

Mr. Greenough: Yes. I mis-spoke myself.

A. Yes, she took the furniture from the lower floor.

Q. Do you know whether that furniture was used in Mr. Kucks' home in Davenport?

A. It was.

Q. You saw it there on later occasions?

A. I did.

Q. And was it there at the time of your mother's death? A. It was.

Q. Did your mother make any other preparations by way of providing furniture or anything of that sort for Mr. Kucks' house prior to the time she left Portland and went to Davenport with him?

A. She went down and got a new rug.

(Testimony of Grover C. Schlaadt.)

Q. Now, subsequent to the marriage of your mother with Mr. Kucks, did you and your wife visit them at Davenport?

A. We visited them the next year, in 1945, on Labor Day.

Q. Now, I think earlier in your testimony, Mr. Schlaadt, you mentioned that you had known Henry Kucks since 1904; is that right?

A. That's right.

Q. How did you become acquainted with him?

A. He went to this fair in St. Louis, and on the way back he [30] stopped with my folks in Helena, Montana, and I met him there.

Q. And since that time have you seen him occasionally?      A. I have.

Q. Prior to your mother's death did you receive word of her illness?

A. We did. It was on Christmas Eve we got a telegram, in 1945.

Q. What Christmas Eve was that?

A. 1945.

Q. And did you go to Davenport?

A. At Davenport, from Davenport.

Q. Yes. Did you go to Davenport?

A. My son brought my wife and I up.

Q. Grover Junior drove you and your wife up there?      A. Yes, sir.

Q. Did his wife Neva accompany you?

A. No.

Q. How long did you stay there, then, on that trip?      A. Stayed there until the first of April.

(Testimony of Grover C. Schlaadt.)

Q. Of 1946? A. Yes.

Q. And your mother died when?

A. January 4.

Q. January 4, 1946? [31] A. Yes, sir.

Q. Just a little over a week, then, after you arrived there?

A. I think about eleven days, I think it was.

Mr. Greenough: You may examine, counsel, with the understanding that we may recall Mr. Grover Schlaadt, Sr., subsequently if necessary.

The Court: Very well; it's time for the mid-morning recess. Perhaps that will give you time to confer, Mr. Brooke. We'll recess for ten minutes.

(Short recess.)

Mr. Brooke: No cross-examination, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

### ARLETHA M. SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenough:

Q. Where do you reside Mrs. Schlaadt?

A. Portland, Oregon.

Q. You're the wife of Grover Schlaadt, Sr.?

A. I am.

Q. Who was the next preceding witness on the witness stand? A. Yes, sir.

(Testimony of Arletha M. Schlaadt.)

Q. How long have you been married to Mr. Schlaadt?      A. Forty years.

Q. Is that your only marriage? [32]

A. Yes.

Q. And has it been his only marriage?

A. Yes.

Q. You heard your husband's testimony concerning the extent of your family, two sons?

A. Yes.

Q. That's correct, is it?      A. That's right.

Q. Incidentally, your son Grover Schlaadt, Jr., and his wife Neva Schlaadt, who are present in the courtroom, do they have any children?

A. They have one son.

Q. How old is he?      A. Seventeen.

Q. And where does he reside?

A. Portland, Oregon.

Q. With his parents?      A. Yes.

Q. Your other son has no children?

A. No, he never married.

Q. Now, to save time, Mrs. Schlaadt, I'm also going to ask you if the testimony your husband gave concerning the place of your residence and the place of his mother's residence and the place of his employment in Portland is correct? [33]

A. That's right, yes.

Q. You heard that testimony, did you, and that's all the fact?      A. Yes, that's all right.

Q. You were acquainted with your husband's mother, Catherina?      A. Yes.

Q. Was she a widow?      A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. When did she become a widow, Mrs. Schlaadt, approximately?

A. I believe it was about the first part of February in '37.

Q. And had she been married more than once so far as you know?

A. Well, the second time was Mr. Kuecks.

Q. What was her age in 1944? A. 76.

Q. I am using 1944, because as you know, events during that year are important in this case.

A. Yes.

Q. Where did Catherina live in 1944?

A. 5004 Southwest View Point Terrace, Portland, Oregon.

Q. And did she own that residence?

A. She did.

Q. Did she own any other property in Portland?

A. Yes, she had a small house next to the big house.

Q. Was it on the same lot?

A. On the same lot. [34]

Q. What use was made of the small house?

A. It was rented.

Q. And did she occupy the large home?

A. Yes.

Q. Describe that home briefly to us, the larger home, the one occupied by her.

A. Well, there was about four rooms and bath upstairs, and about four rooms downstairs, the living and dining rooms were together, and the bath.

Q. Was there a bath downstairs? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Two baths, and was it a comfortable home as to furnishings? A. Very nice home.

Q. And how long did she live there?

A. Well, let's see, that home was built about 1920, I believe it was.

Q. It was built while her husband was alive?

A. Yes.

Q. And she had lived there continuously?

A. Yes.

Q. Were you acquainted with friends and acquaintances that Catherina had in Portland?

A. I was.

Q. Did she have many of them?

A. Yes, she did. [35]

Q. Was she active socially in gatherings among her friends back and forth?

A. Well, she used to go around with a bunch there, all German people, and they had their little club together.

Q. Well, not only their club affiliations, but did they visit back and forth a good deal as folks of that age do very often? A. They did, yes.

Q. From what you observed of Catherina and from statements she has from time to time made to you, do you draw the conclusion that she was contented and happy in her surroundings there in Portland? A. She was.

Q. Now, did you on occasion visit Catherina while your husband was at work?

A. Yes, I used to come in two, sometimes three times a week.

(Testimony of Arletha M. Schlaadt.)

Q. How would you get to her home?

A. I rode in with Grover, and he let me off close to her place.

Q. Was her home on his way from your house to his employment?

A. Yes, fourteen miles we lived out from her place, and he worked about a mile down from her home, north.

Q. And her home was on the route between your home and his employment?      A. Yes. [36]

Q. Now, do you recall an occasion when, going into your husband's mother's home on one of these visits, you found Henry Kucks there? Just answer that yes or no.      A. I did, yes.

Q. You recall that?      A. Yes.

Q. Now, give us the date of that occasion as nearly as you can fix it in your recollection.

A. Well, I don't know whether it was the middle or a little later in June. I don't know the exact date.

Q. Will you tell us what year it was, Mrs. Schlaadt?      A. 1944.

Q. Now, was Mr. Kucks in your mother's home when you went in there that morning, or did he appear later that day?

A. He was there when I went in.

Q. Who else was there besides him?

A. Mother was there.

Q. Just the three of you were present, then, after your arrival?      A. That's right.

Q. Did your husband go into your mother's

(Testimony of Arletha M. Schlaadt.)

home with you on that morning? A. No.

Q. Now, Mrs. Schlaadt, did you have conversation with Catherina and also with Henry during that day? [37] A. I did.

Q. Speaking now of this day in June, 1944, tell us what occurred and what was said when you arrived there and after your arrival there.

A. Well, I went in and saw Henry there, and I was kind of surprised, and we talked a few minutes, and then I told him we were very sorry to hear about Ida passing away.

Q. Now, Ida was who?

A. Ida was his first wife.

Q. And she had died?

A. She had died in January of that year.

Q. All right, continue.

A. And then I forget just what—oh, he was talking about her a few minutes, you know, about her sickness and how it happened, one thing and another, and then pretty soon, why, he said to me, “Well, now, I suppose you’re wondering why I’m up here.” Well, he says, “I came up to make a proposition with your mother. I asked her to marry me, and I told her if she would, I would leave all my property to Grover and Garfield, as I have no one to leave it to,” and then she said “I told Henry he’d have to give me a little time to think it over; you know, I have a pretty nice home here, Henry,” and he says, “Kate, I know you have; I have a nice home in Davenport, too.”



(Testimony of Arletha M. Schlaadt.)

Q. Now, was that the sum and substance of that conversation [38] on that day, or was there further discussion?

A. And then she told him, "I'll go up to Davenport"——

Mr. Brooke: Now, just a moment; your Honor, I'm going to object to any statements that Mrs. Schlaadt may have made. She can testify to any statements made by the deceased; as I understand, the wife of a party in interest is not barred, but it isn't my understanding that she can testify as to statements Mrs. Schlaadt may have made, that they would be self-serving declarations and hearsay.

Mr. Greenough: Not hearsay if Mr. Kucks was present.

Mr. Brooke: Well, he's deceased. Under the rule, she can testify as to any statements he might have made, any contract.

Mr. Greenough: Under Section 1211 this witness is not an interested party.

The Court: As I understand it, I tried to make an examination of that, and if the community would benefit from the contract which is alleged, then the wife is barred, but if the community does not benefit, if it would be a separate estate of the husband, then the wife is competent, and as I understand it, that is the situation here under Oregon law, which I suppose would govern. I am not passing on the question whether if this witness started to relate a conversation she had with Mrs. Schlaadt, [39] Catherina Schlaadt, afterward Catherina Kucks, out of the presence of Henry Kucks, that would be a different

(Testimony of Arletha M. Schlaadt.)

question, but here I think if she's competent to testify to what he said, she's also competent to testify to the other side of the conversation with him. For instance, take an example; suppose she said Mrs. Schlaadt made a statement to him and he nodded his head; certainly you'd have to take that to tell what he did say, or what was the subject of the conversation. I'll overrule the objection.

(Pending question and partial answer read by the reporter.)

The Court: Of course, this is apparent, but I'll assume in this line of interrogation unless you indicate to the contrary, that all this conversation with Mrs. Schlaadt was in the presence of Mr. Kucks.

Mr. Greenough: She has indicated the affirmative on this.

The Court: Yes.

Q. Now, go ahead and finish that answer.

A. She said "I'll tell you what I'll do, Henry; I'll go up to Davenport and look your place over, then I'll give you my answer," and so she did.

Q. Well, did he respond to that statement in any way?

A. Well, he seemed to be pleased about it; he said that was all right, Kate. [40]

Mr. Brooke: I object to that as not responsive.

Q. Don't say what he seemed to do. If he said anything, tell us what he said.

A. He said, "That's all right, Kate."

Q. Well, now, did these conversations between

(Testimony of Arletha M. Schlaadt.)

the three of you to which you have just testified, Mrs. Schlaadt, did they occur rather soon after your arrival at Catherina's home that morning?

A. Yes, shortly after.

Q. And you were there with Henry and Catherina, then, for the balance of the day until your husband called for you after he completed his work?

A. That's right.

Q. Now, were there further discussions with the three of you present concerning this subject of Mr. Kucks' as he put it "proposition" to Catherina? Was that subject brought up later in the day?

A. Oh, different times we'd talk about it, that he thought they would get along very nicely, and she was living in that big house alone, it would be a companion for both of them, but we didn't talk a whole lot about him.

Q. Now, have you in what you've told us about the conversations, have you covered substantially, Mrs. Schlaadt, the tenor of the conversations during the day you were there this particular day? [41]

A. Well, she said she was going to Davenport, and then about when she came back——

Q. No, I'm just talking about——

A. Well, there wasn't much. We just kind of talked about different things there, not much more was said about the proposal.

Q. Did he say where he was going after he left Portland?

A. Yes, he said, "As long as I'm up here, Kate,

(Testimony of Arletha M. Schlaadt.)

I think I'll go down and see George," he was stationed down at Gold Beach; he says, "He has a new wife, and I would like to see how they will treat me. I may be gone two or three days or a week."

Q. Explain to Judge Driver who George is.

A. George is the boy that they raised.

Q. That who raised?

A. Mrs. Kucks and Mr. Kucks.

Q. He had taken a boy in as an orphan and had raised him, but they had never adopted him?

A. Never adopted him.

Q. And the boy later went out on his own?

A. Well, he was in the Coast Guard at that time.

Q. And George's last name was——

A. Handel.

Q. H-a-n-d-e-l?

A. I don't know just how it is. I think that's the way it was. [42]

Q. It's mentioned in one of the wills, if your Honor pleases. Now then, did your husband pick you up that day to take you home?

A. That evening, yes.

Q. When he came to pick you up did he come into the house?      A. Yes, he did.

Q. And who was then present after your husband came into the house?

A. Mother and Mr. Kucks and myself.

Q. Was there conversation after your husband's arrival between him and your mother and Mr. Kucks? Just answer yes or no.

A. Yes, there was.

(Testimony of Arletha M. Schlaadt.)

Q. Now, after your husband's arrival in the latter part of the day to pick you up and take you home, what did your mother say in the presence of yourself and your husband and of Henry Kucks?

A. Well, he told him, told Grover—

Q. I'm speaking of what did your mother say? I mean Catherina, Grover's mother; what did she say when you and Grover and Henry were all there together that evening?

A. Well, she asked Grover what he thought of the proposition.

Q. Well, first did she tell him the proposition?

A. Well, yes, she did; Henry did.

Q. Just give us her words as nearly as you [43] can.

A. Henry told him.

Q. All right, what did Henry say to Grover?

A. Well, he said the same thing to Grover as he did to me; "I came up here to make a proposition with your mother, Grover, and I asked her to marry me, said if she would I would leave all my property to you and Garfield; I have no one to leave it to."

Q. What was said then by your mother, or anything further by Henry?

A. Well, she didn't say much at that time, but then a little later she asked him "Well, what do you think about that, Grover?" and Grover said "That's up to you, you've known Henry so long, and that's up to you to decide," so then she told him the same as she'd told me, that she'd go to Davenport and look this place over.

Q. You say she then told him she'd go to Davenport and look things over?

A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Now, was there any further conversation before you and Grover left to go to your home that evening, as to this general proposition of marriage, or have you covered it?

A. I've just about covered it, because he didn't get to stay very long, he had to hurry home on account of being on the farm, we had cows and chickens and things to attend to, and we didn't get to stay too long. [44]

Q. Now then, did Catherina then go to Davenport, later? A. She did.

Q. About how long after this occasion in June when this meeting at her house with Henry Kucks had occurred?

A. Well, when I saw her again she said Henry had been back——

Mr. Brooke: Well, now, just a moment; I'm going to object to that.

Q. All right, I'm withdrawing it. I'm asking you how long after this day when you found Henry Kucks at your mother's house, how many days, approximately, after that was it that Catherina went up to Davenport? I'm not asking for any conversation.

A. Well, after he came back, he was gone about a week, and then when he came back she waited about a week or a little better before she went up there; I don't know just how long.

Q. Did she and he go up there together?

A. No, they did not.

(Testimony of Arletha M. Schlaadt.)

Q. But she went up about a week later?

A. Yes.

Q. How long did she stay on that trip?

A. She was gone ten days.

Q. Now, while she was there did you receive a postcard from her?      A. Yes. [45]

Q. What was the substance of the postcard?

A. Well, she told me the day she would be back, and she'd like to have me at her home.

Q. To meet her?

A. To be there, yes, when she came in.

Q. Now, did you go there on that day?

A. I was there.

Q. Did you have a key by which to gain admittance to her home?      A. Yes.

Q. Did she arrive home on that day as planned?

A. Yes, she did.

Q. And when she arrived were you at her home?

A. I was at her home when she came in.

Q. Was anyone present other than you and her?

A. Just her and I.

Q. What did she do and say at that time when she came in?

Mr. Brooke: Well, just a moment. I object to that on the grounds it is hearsay and a self-serving declaration.

The Court: I presume this same question will probably come up again and again in this case, as to whether conversations which people had with Catherina Schlaadt Kucks are admissible. It would be hearsay if she were living. Now, is there an ex-

(Testimony of Arletha M. Schlaadt.)

ception to the [46] hearsay rule because she is dead and not available as a witness? That's the question, isn't it?

(Argument by counsel.)

The Court: I'll sustain the objection. Proceed.

(Further argument by counsel.)

The Court: Now, I think my ruling will be, after certainly mature consideration of this question, which is a troublesome one, will be that I'll overrule the objection but it's understood, of course, that evidence of this kind is admitted not as evidence of facts that may have been recited or asserted by Mrs. Schlaadt in these conversations, but purely and solely for the purpose of showing her state of mind at the time the assertions were made by her, and it will be understood, of course, and the record will show that the ruling of the Court is over the objection of the defendants here.

(Pending question read by the Court Reporter.)

Q. (By Mr. Greenough): Did you hear the question, what did Catherina do and say at that time? We have the time when you were at her home waiting for her to return from this ten day or so visit to Davenport. Now, do you have the question and the time in mind?           A. Yes.

Q. You may proceed to answer the question.

Mr. Brooke: May it be understood our objection [47] goes to all this line of testimony?



(Testimony of Arletha M. Schlaadt.)

The Court: Yes, the record may show your objection goes to all this line of testimony by this witness or anyone else without repeating the objection each time.

A. Well, when she came in she was all smiles, and she held her hand out to me and showed me a ring.

Q. Now, you say a ring; it was on her left hand, on her right finger, and it looked like an engagement ring?

A. No, it was on her left hand.

Q. I say, it was on the finger upon which a woman usually wears an engagement ring?

A. Yes.

Q. Go ahead.

A. And I said, "Well, I know what your answer is," and I said, "Where and when are you and Henry going to be married?" and she said, "Henry wants to get married at Vancouver, Washington." Shall I go on?

Q. Just continue with the conversation.

A. She said, "I would like to have you and Grover go with us to be a witness for us," and she said, "He'll be here about the 7th of August, and we'll go over about the 8th, and I would like to have you go with us to get the license," and she said, "We have to wait three days before we can be married," and then she said she wanted to go uptown and pick out some linoleum. [48]

Q. Pick out what?

(Testimony of Arletha M. Schlaadt.)

A. She took Henry's measurements of his floor, and said, "I want to get a rug, because he has linoleum on his floor." She said, "His house is dirty, but I can clean it up, and with my furniture I can make it look nice," so then I went uptown with her a little later and we picked out a rug.

Q. Was there any other conversation on that occasion? Did you stay with her the balance of the day, then, until your husband picked you up?

A. Yes.

Q. What time did she arrive from Davenport?

A. I think it was between 10:30 and 11. She came in on that morning train from Spokane.

Q. And you stayed with her the balance of the day?

A. Yes.

Q. Was there any further conversation as to her agreement or decision to marry Mr. Kucks?

A. Yes, she said, "I think Henry is a man of his word, and I think that he will stick by my boys," that he said that he would turn his property over to them, and she said, "Henry spoke about being Grover was a farmer, that he would like for Grover to have the Davenport farm, the land."

Q. Well, now, when you say that—this comes as rather a surprise to me, your Honor—when you say she said she [49] would like to have Grover have the Davenport farm—

A. Henry said that.

Q. Oh, she said to you that Henry had said to her—

A. Yes. I didn't know whether that was—

(Testimony of Arletha M. Schlaadt.)

Mr. Greenough: We're willing to have that stricken.

The Court: I think that should be stricken and the court disregard the statement as to what Henry said.

Mr. Greenough: Yes, it's purely hearsay.

The Court: That's what I had in mind.

Mr. Brooke: Well, I don't quite understand that ruling, your Honor. She's testifying to what Mrs. Schlaadt told her when she came back from Davenport, and she's relating what she found out and what Henry told her. Now, after an hour of argument—

Mr. Greenough: If you want to leave it in we're perfectly willing to leave it in.

The Court: Of course, I can't tell in advance what a witness is going to say, and insofar as it indicates a state of mind of Mrs. Schlaadt that might have material bearing on the issues I'll admit it and regard it, but otherwise I'll not consider it for any purpose. Now, the thought I had in mind was when she says Mrs. Schlaadt says something Mr. Kucks said to her, I think what she said about Mr. Kucks saying to her is clearly not competent, and I'll strike that and disregard it. [50]

Mr. Greenough: Your Honor, may I retract my offer to agree that it be stricken? I can see that on a certain theory of law it might be admissible if it's treated as evidencing Mrs. Catherina Schlaadt's state of mind, especially if counsel objects to anything being withdrawn.

(Testimony of Arletha M. Schlaadt.)

Mr. Brooke: If I understand the question correctly she said Mrs. Schlaadt said Henry told her he wanted Grover to have the Davenport farm. I object to having that stricken.

Mr. Greenough: Well, we'd like to have it in.

The Court: Well, all right.

Mr. Greenough: I take it that it's in, your Honor?

The Court: Yes. We have to draw some very fine distinctions, but without being too artificial about it, I will regard that as evidence of what Mrs. Schlaadt was thinking, but not evidence that Mr. Kucks made the statement.

Mr. Greenough: That's right.

Q. (By Mr. Greenough): Now, following that up, Mrs. Schlaadt, did Catherina say anything to you on that same occasion as to what land Mr. Kucks told her he wanted Garfield to have?

A. Yes, she said, "Henry would like to let Garfield have the Canada property."

Q. Was that land in Canada? [51]

A. Yes.

Q. Now, what you've testified as to the conversation between you and Catherina on this occasion when she returned from Davenport, does that fairly cover the conversation you had that day, I mean not every word, but generally the subject on this topic? A. Yes.

Q. When did you go home, then, to your own home, from that meeting with Catherina?

(Testimony of Arletha M. Schlaadt.)

A. That same day, Grover came down to get me after work.

Q. That same evening?           A. Yes.

Q. And did Grover come into the house on that occasion?           A. Yes.

Q. And was there conversation between you and Grover and Catherina that evening when he came to take you home?

A. Yes, she told him the same as she told me.

Q. Now, you mean substantially the same remarks——           A. So he——

Q. Just a minute, let me finish my question before you start to answer, please; when you say “she told Grover the same thing she told me,” you mean substantially the same utterances that you have testified here she made to you during the course of that day?           A. Yes. [52]

Q. And did she show Grover her engagement ring?           A. Yes.

Q. Now, subsequent to that day when you met Grover’s mother on her return from Davenport, when did you next see Mr. Henry Kucks?

A. I didn’t see him any more until he came in on the morning of the 8th.

Q. The 8th of what?

A. Of August, 1944.

Q. And did you see him then?

A. Yes, we went over to Vancouver to get the license; I went with them.

Q. When you say we went, you mean Catherina and Henry and you?           A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Went to Vancouver, Washington, and got the marriage license?      A. Yes.

Q. And you served as a witness at that time?

A. Well, yes.

Q. Or did they need a witness?

A. They didn't really need one, but they wanted me along.

Q. Now, when the wedding occurred were you present?      A. Yes.

Q. Where did that wedding occur?

A. In the courthouse at Vancouver, Washington.

Q. And who performed the service? [53]

A. Some judge.

Q. You don't remember his name, but was he a judge, or a minister, or what?

A. No, he was a judge; justice of the peace, I think.

Q. A justice of the peace. Who was present at that time?      A. Just Grover and myself.

Q. And Catherina and Henry?      A. Yes.

Q. Now, incidentally, did you all four drive over to Vancouver, Washington, together?

A. Yes.

Q. And did you return together?

A. We did.

Q. By automobile, I suppose?      A. Yes.

Q. Was there any conversation during that trip over or back about any arrangement as to disposition of the property?      A. No.

Q. Now, was there a wedding dinner that evening?      A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Where did that occur?

A. At mother's home.

Q. At Catherina's home?           A. Yes.

Q. Who was present at that time, Mrs. [54] Schlaadt?

A. Well, there was my son and his wife, Grover and I——

Q. Well, when you say your son and his wife, you mean Grover, Junior?           A. Yes.

Q. And Neva, and Grover, Senior?

A. Yes, and myself.

Q. And then the married couple?           A. Yes.

Q. Subsequent to the marriage, then, I assume that Catherina and Henry went to Davenport to his home?           A. Yes.

Q. About how long after the marriage?

A. Well, it was about a week or maybe a little better. They were packing up, crating her furniture and packing some dishes.

Q. What were they packing up, Mrs. Schlaadt?

A. Yes.

Q. I say, what were they packing up?

A. Oh, their dishes and clothes, and they had the furniture, they were fixing the furniture up, wrapping things around.

Q. Furniture and dishes——           A. Yes.

Q. Please, just a minute until I finish my question, Mrs. Schlaadt. You're jumping the gun on me all the time. Furniture and wishes from [55] where?           A. From View Point, Portland.

Q. View Point, Portland. Well, you mean from Catherina's home?           A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. Her furniture and her dishes?

A. Her furniture and her dishes.

Q. Now, did they take those to Davenport?

A. Yes, sir.

Q. Did you and your husband visit Catherina and Henry at Davenport at any time, then, subsequent to their marriage? A. In 1945 we did.

Q. When in 1945, if you recall?

A. Well, we went up there a couple of days before Labor Day, and we were there over Labor Day.

Q. Now, during your stay on that Labor Day visit in 1945 did Henry *Schlaadt* make any statement to you as to his disposition of his property? Now, you may answer that yes or no.

A. Well, what year did you say?

Q. This Labor Day visit in 1945. During that visit of you and your husband to Davenport did Mr. Henry *Schlaadt*—I mean Henry Kucks, make any statement to you or have any conversation with you on the subject of his disposition of his property upon his death? You may answer that simply yes or no. [56] A. Well, yes.

Q. All right. Now, what did he say? In the first place, where were you when he made the statement?

A. We was in his home, and he said, "I want to take you and Grover out to see my land, because—" he says, "that's what I want Grover to have."

Q. Well, did you go out to see the land?

A. We did, we went out to see his land.

Q. Who went out to see it?

A. Just Grover and I and mother and Henry.



(Testimony of Arletha M. Schlaadt.)

Q. When you say mother, you mean Catherina?

A. Yes.

Q. And where was that land situated, Mrs. Schlaadt?

A. About six miles, I think it is, out of Davenport.

Q. Six miles away from where he resided?

A. Yes. I don't know, it's kind of southwest, or something.

Q. In other words, Mr. Kucks did not reside on his farm?           A. No, he had a home in town.

Q. Did he operate the farm at that time?

A. No, I believe he had it rented out.

Q. Did he make any comments to you or to your husband in your presence as to the quality of the farm or any features of the farm?

A. Yes, he was showing Grover about different parts of it would be the best, what to put in. I didn't pay a whole [57] lot of attention to that part of it myself, but I heard him talk to Grover about it.

Q. If you don't recall what the conversation was, just say so.           A. No.

Q. Now, did you receive any word prior to Catherina's death as to her illness?

A. Yes, during Christmas.

Q. What Christmas?           A. Christmas Eve.

Q. Christmas Eve, and of what year?

A. 1946.

The Court: Wasn't that 1945?

(Testimony of Arletha M. Schlaadt.)

A. 1945; Yes, pardon me.

The Court: It's contrary to what she testified before.

Q. And what was that, a telegram?

A. Yes, it was.

Q. From whom?

A. I believe Mr. Zimmerman sent it, or Mr. Jahnke, I don't know which sent that; either one of them.

Q. And did you go up there following the receipt of that word?

A. We left right away and drove all night.

Q. Who went?

A. My two sons, and Grover, and myself. [58]

Q. Your two sons? A. Yes.

Q. That is Grover, Junior, and who?

A. William.

Q. That's the war veteran? A. Yes.

Q. And your husband Grover, and yourself?

A. And my son Grover, yes.

Q. And then you were there at the time Catherina died, then? A. Yes.

Q. And how long after Catherina's death did you remain in Davenport?

A. We stayed there until the first of April.

Q. Now, during your visit on that occasion, that is, during Catherina's last illness and death, did Henry Kucks say anything in your presence to you or anyone else present as to what action he had taken or intended to take with respect to his prop-

(Testimony of Arletha M. Schlaadt.)

erty disposition upon his death? You may answer that yes or no.

A. No, I don't remember anything at that time, but I know a little later——

Q. I can't hear you.

A. I know a little later he talked, after Mother passed away.

Q. Well, that's what I'm asking.

A. He went down to make a will. [59]

Q. I'm asking you on this occasion when you were up there for Catherina's last illness, and she died, and you stayed there until the first of April——

A. Yes.

Q. Now, during that time that you were in Davenport did Henry Kucks make any statement to you or to anyone else in your presence which you overheard as to——

A. Grover and myself were there.

Q. All right, what did he say?

A. And he said, "I'm going down and make a will out today," so they went down, and when he came back, they didn't get back until toward evening, and he said, "Well, I made a will out today, and I want Grover to have the Davenport farm, and Garfield to have the Canada farm," and he said, "That will make a good living."

Q. I don't get that last.

A. He said, "That will be a good income for Grover, but don't ever sell the farm, Grover, the land," he always called it the land, "don't ever sell the Davenport land, Grover."

(Testimony of Arletha M. Schlaadt.)

Q. How long had you known Henry Kucks?  
When did you meet him, in other words?

A. '27.

Q. 1927?           A. Yes.

Q. And you had seen him intermittently from that time up until [60] the time of his death?

A. Yes; he had been out to the farm two or three times to see us.

Q. He visited you and Grover?

A. Yes, he did, he and Ida both.

Q. He and his first wife?           A. Yes.

Mr. Greenough: You may examine.

#### Cross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, do you speak German?

A. No, I don't.

Q. Did Mr. Kucks speak German?

A. Well, I guess he did. He never talked it in my presence. They 'most always talked English.

Q. Did your mother speak German?

A. Yes, she did.

Q. Did they ever carry on a conversation in your presence in German?           A. No.

Q. Well, then, I understood you to say that the proposition was that if your step-mother would marry Henry, he would leave his property to Grover and Garfield?           A. Yes.

Q. Is that the entire converastion?

A. Well, I don't know exactly. He said something about, [61] started talking about land, there.

(Testimony of Arletha M. Schlaadt.)

He said, "I would like to have Grover, because Grover is a good farmer."

Q. I'm talking about the first time down there in Portland when this matter first came up in your home, or her home, rather.           A. Yes.

Q. What was the entire conversation on that occasion?

A. Oh, he said, "Well, I came down to make a proposition with your mother here. I asked her to marry me, and I told her that if she would, I would leave all my property to the boys, Grover and Garfield."

Q. Did he say how he would divide it between the two boys?

A. Well, not right at that time.

Q. He didn't say?           A. No.

Q. And your mother also had a daughter, didn't she?           A. Yes.

Q. Any mention made of her during any of these conversations?           A. No.

Q. Now then, the next time this agreement came up was after Mrs. Schlaadt had passed away and when you were living at Davenport and he went down to make his will, is that right?

A. That's right.

Q. Do you remember when that was, what month?

A. Yes, it was in February, about the 11th or 12th. [62]

Q. And at that time he told you he was leaving the Davenport land to Grover, and the Canada land

(Testimony of Arletha M. Schlaadt.)

to Garfield, is that right? A. That's right.

Q. Now, as I understand it, those were the only two conversations you ever had concerning this proposition with Henry Kucks? A. Yes.

Q. And when you went to the courthouse, all of you in the automobile, there was no discussion of this matter at all? A. No.

Q. Did he talk generally to people about his business affairs, do you know?

A. Well, not that I know of.

Q. He didn't make a practice of doing that, did he? A. Not that I know of.

Q. And what was his physical and mental condition when you first met him?

A. Oh, all right.

Q. He was rather a vigorous man for his age at that time? A. Yes.

Q. And mentally alert?

A. Well, he seemed to be.

Q. And that was in 1944?

A. That's right. [63]

Q. And what was the difference in age between Mr. Kucks and your mother when they were married?

A. Well, she would have been 77 in November. That would make her 76 then, of course.

Q. And he was about 81? A. Yes.

Q. About four years difference in age?

A. That's right.

Q. And what was your mother's state of health at that time?

A. She was all right, she was feeling good.

(Testimony of Arletha M. Schlaadt.)

Q. In other words, neither one of them were suffering from any infirmities that you could observe?      A. No.

Q. Now, where did you live after your step-mother died?

A. We were living in her home on View Point Terrace.

Q. Well, I meant when you were at Davenport.

A. We stayed at Henry's home.

Mr. Greenough: Did you say step-mother?

Mr. Brooke: I meant mother-in-law.

The Court: I think it's understood when you say mother, you mean mother-in-law.

A. Yes. We always called her mother; I did.

Q. You went up for the funeral?

A. Yes. Well, yes, we went up there from the time that we got the telegram she was very sick, and I stayed right [64] through until the first of April.

Q. And you didn't return to Portland in the meantime?      A. No.

Q. Now, where did you live up until that period of April 1, 1946?

A. We were living in Portland.

Q. No——

A. Oh, we were staying in Henry's home with him.

Q. And were you and Grover looking after him at that time?      A. Yes.

Q. And what was his condition?

A. It was all right.

(Testimony of Arletha M. Schlaadt.)

Q. And wasn't it the understanding that you were to stay there and continue to look after him?

A. No.

Q. Didn't you have that understanding with Henry Kucks? A. No, I did not.

The Court: I'm not sure I understood, when was it that Catherina Kucks died?

A. On January 4.

The Court: And then how long was it you stayed with Mr. Kucks after that?

A. Until the first of April, when he came up to our home.

The Court: You and your husband stayed there, and then you both went to Portland? [65]

A. Yes, all three of us.

The Court: On this occasion when you saw the ring on Catherina Schlaadt's finger, how long was that after she had got back from Davenport?

A. Well, that was the first day that she got back, that she showed me the ring.

The Court: All right, go ahead.

Q. (By Mr. Brooke): Now, what was Henry's physical condition after your mother-in-law passed away?

Mr. Greenough: I think that's repetitious. It's been asked and answered. I have no objection to it being answered.

The Court: I didn't quite get the question.

Q. As to Henry's physical condition, that would be after December, 1945, up until April 1, 1946,



(Testimony of Arletha M. Schlaadt.)

when you and Grover were there. I don't think I covered that period.

A. Well, he broke his arm while he was with us.

Q. That was when you were with him at Davenport?

A. No, when he came to our home with us.

Q. Well, when did he come to your home?

A. First of April.

Q. In 1946?           A. Yes.

Q. And how long did he stay with you, then?

A. Well, we were there until a few days before Decoration Day, [66] when he wanted to come home.

Q. At that time didn't he request you to come back to Davenport and look after him?

A. No, he didn't request it, but he said we could.

Q. What was his physical condition outside of his arm being broken?

A. Well, his arm bothered him, and he always used to rub a lot of stuff on him that was quite strong, and he said, "I think my old cancer is coming back." He said, "I have been operated on for cancer, and I believe that that is coming back."

Q. And at that time wasn't it necessary that he have someone look after him?

A. Well, he had had a housekeeper before, and he said, "I'm going to try and get that housekeeper again if I can."

Q. Was the housekeeper there when you and Grover were living with him?

A. No, I never met her.

Q. When did you next come back?

(Testimony of Arletha M. Schlaadt.)

The Court: I'm sorry, I didn't quite get that; you say Mr. Kucks came to Portland with you?

A. Yes.

The Court: And how long did he stay there?

A. Until a few days before Decoration Day; he wanted to come back. [67]

Q. (By Mr. Brooke): Then did you come to Davenport after that? A. Yes, we did.

Q. When?

A. Let's see, I don't remember if it was—1947 we went up and we had gone up for Decoration Day, and then Henry wanted Grover to come back that fall to go up to Canada with him, he said he was taking Mr. Zimmerman and Grover up to Canada with him. I believe it was 1947.

Q. What year did you say that was?

A. Well, now, I'm not sure whether it was 1946 or 1947. Maybe Grover remembers.

Q. And how long did you stay that time?

A. I stayed with Mrs. Zimmerman while they went to Canada.

Q. I see.

A. Because he had a young couple staying in his house at that time.

Q. And were you ever back there after that?

A. Yes, we went up in 1948 for Decoration Day.

Q. Decoration Day in 1948? A. Yes.

Q. And how long were you there then?

A. We had to stay with him pretty near three weeks, on account of the floods were so bad we couldn't get back.

(Testimony of Arletha M. Schlaadt.)

The Court: Was that the year that Vanport was flooded? [68]

A. That's right.

The Court: I was in Portland at that time; I remember that.

A. Well, you know, then, how the floods were.

Mr. Brooke: If I may have just one minute, your Honor.

The Court: Yes, all right. I usually take a recess at 3 o'clock. I'll take a ten minute recess now.

(Short recess.)

Q. (By Mr. Brooke): Mrs. Schlaadt, did you stay with Mrs. Zimmerman in Davenport when Grover and Henry and a few others made a trip to Canada? A. I did.

Q. And during that visit did you not tell Mrs. Zimmerman that you and Grover would not stay in the state of Washington and look after Henry?

A. I did not.

Q. That you wanted to return to Portland, where your family lived? A. No.

Q. You did not make that statement?

A. I did not make that statement.

Q. Do you recall about that time of having a dinner with Mr. and Mrs. Jahnke?

Mr. Greenough: Your Honor please, I don't see [69] the materiality of this line of questioning under the pleadings. There's nothing in the pleadings to the effect that there was any agreement by either Mr. or Mrs. Grover Schlaadt or any of the rest of the plaintiffs, I mean the other plaintiff, or

(Testimony of Arletha M. Schlaadt.)

his relatives, to stay there and care for Henry Kucks. I anticipate that's what counsel is driving at by this line of questioning.

Mr. Brooke: May it please the Court, there is in evidence the will made in February, 1946, giving two-thirds to Grover and one-third to Garfield, and I think I'm entitled to lay the foundation for an impeaching question at this time which will be connected up later on when we get into our case.

Mr. Greenough: If it's pertinent to the examination in chief. I don't see that this is at all material and pertinent to that.

The Court: Well, it's doubtful whether it's proper cross-examination, but if you expect to connect it up later, you may go ahead.

Mr. Greenough: May I ask Mr. Brooke if I understand correctly whether you're inquiring now as to the visit concerning which the testimony has been that they went up before Catherina's death and remained until April, 1946?

Mr. Brooke: That's right. [70]

Mr. Greenough: And you're saying this has some effect on the will drawn in February?

Mr. Brooke: I've already asked her whether she and Grover had an agreement to stay there and look after Henry, and she denied that. Now, I'm asking her, for the purpose of laying the foundation for an impeaching question, whether or not she did not make the statement to Mr. and Mrs. Zimmerman at their home to the effect that she and Grover would

(Testimony of Arletha M. Schlaadt.)

not stay in the state of Washington and look after Henry.

A. No.

The Court: The reporter can't see you. The answer is no.

Q. (By Mr. Brooke): Do you recall having dinner with Mr. and Mrs. Fred Jahnke at Davenport, in their home? A. Yes.

Q. Approximately when was that, Mrs. Schlaadt?

A. That was in 1948, I believe, when we came up. We hadn't been in the home very long when Henry said, "I'm going to call Mr. and Mrs. Jahnke up and tell them that the folks are here from Portland."

Q. What?

A. Henry said, "I'm going to call Mr. and Mrs. Jahnke up and tell them that the folks are here from Portland."

Q. And you all had dinner together, did you [71] not?

A. They came down and invited us up for dinner the next day.

Q. You had dinner all together, did you not?

A. Yes.

Q. And during the course of that conversation do you recall the statement being made that Mrs. Jahnke understood you were going to stay there and take care of Henry Kucks, and you replied that you would not stay in the state of Washington for any consideration?

Mr. Greenough: First, this time, again.

Mr. Brooke: She fixed it.

(Testimony of Arletha M. Schlaadt.)

Mr. Greenough: Well, what is it? I want it more specific than 1948 or whatever it was. I think I'm entitled to know the time and place.

The Court: Yes, the time when this occurred.

Mr. Greenough: Well, he's asking the question.

Mr. Brooke: I asked the question and she gave the time.

A. We came up for Decoration Day.

The Court: 1948?

A. Yes.

Q. (By Mr. Brooke): Did you not have a dinner at their home also in 1946? A. Yes.

Q. Before you returned to Portland?

A. We did. [72]

Q. You recall that circumstance? A. Yes.

The Court: Now, is this time before they returned to Portland on April 1, 1946?

Q. Yes, prior to April 1, 1946.

The Court: All right.

Q. Do you know how soon it was before you returned to Portland? A. In 1946?

Q. Yes. A. On April 1.

Q. Was that the day you had the dinner?

A. No, we had it before, because I remember there was a lot of snow on the ground.

Q. And do you know how long before then it was that you had the dinner?

A. It was shortly after mother had passed away; that was in January.

Q. At whose home was that?

A. At Mrs. Jahnke's.

Q. At Mrs. Jahnke's? A. Yes.

(Testimony of Arletha M. Schlaadt.)

Q. And at that time did you not make a statement that you would not stay there and look after Henry?

A. I never made any statement like that. [73]

Q. How many times did you have dinner with the Jahnke's, do you recall?

A. Twice that I know of.

Q. Did you ever make the statement on either one of those occasions?

A. No.

Q. Do you know what furniture your mother-in-law took up to Davenport?

A. I do.

Q. Can you tell me?

A. Yes.

Q. Would you?

A. Yes. She took the rug she had just bought, a new rug, davenport and chair, a table, a dining table, and six chairs—

Q. You say a dining table and six chairs?

A. Yes; two rockers, and a dresser, and a bedroom rug.

Q. A small bedroom rug, wasn't it?

A. Yes, nine by twelve.

Q. Is that all?

A. Then a couple of little blankets and a quilt and dishes. She had some dishes there that had belonged to her mother at one time.

Q. Do you know how long Henry had lived in that home before your mother-in-law married him? [74]

A. No.

Q. You don't know?

A. I don't know.

Q. He lived there with his former wife, did he not?

A. Yes, he did.

(Testimony of Arletha M. Schlaadt.)

Q. And they kept house there?

A. They did.

Mr. Brooke: That's all.

### Redirect Examination

By Mr. Greenough:

Q. Mrs. Schlaadt, did you ever see Henry Kucks read or write English?

A. The first time I ever saw him write was when he signed his name on the marriage certificate.

Q. Now, you say the first time. Did you ever see him write anything other than his name in English?      A. Never.

Q. Did you ever see him read anything in English?      A. No.

Q. Now, you testified, I believe, that when you were there in Davenport and following Catherina's death, Henry one day said "I'm going down to make a new will" and later that day you testified he came back and said he had made a new will, and that he had left his property thus and so.      A. Yes.

Q. Now, concerning that, Mr. Brooke questioned you as to what [75] land he said he was going to give to Garfield and what land he said he was going to give to Grover. Now, with reference to that will that Mr. Kucks mentioned to you, my question is, did you ever actually see that will?

A. No, I did not.

Q. You know nothing further about it than what Mr. Kucks told you?

A. That's right, that's all I know about it.



(Testimony of Arletha M. Schlaadt.)

Q. Until this lawsuit started and we had a copy of the will, and then you saw it?

A. That's right.

Q. Now, what was the reason for you staying in Davenport following Catherina's death until April 1, 1946?

A. Well, they had to settle an estate of mother's.

Q. They had to settle Catherina's estate?

A. Yes.

Q. And were you required to remain there for that?

A. Pardon?

Q. Were you required or obligated to remain there until Catherina's estate was settled in Davenport?

A. Well, Henry wanted us to stay so that he could go back with us to Portland, what he planned on doing, so we waited there until that was settled.

Q. Incidentally, when Henry did go back to Portland with you how long did he remain in Portland with you after April 1, [76] 1946?

A. Well, he wanted to be home for Decoration Day, and we got home just a few days before that time.

Q. When you say "home," you mean Portland?

A. He wanted to be in Davenport for Decoration Day.

Q. Well, I don't think you understood. He went down with you on the first of April and he stayed with you until it was time for him to leave for Davenport by Decoration Day?

A. Yes.

Q. And he went back under his own power?

(Testimony of Arletha M. Schlaadt.)

A. No, we drove him back.

Q. How long did you stay after you got him back there for Decoration Day?

A. Well, I don't know just how long it was.

Q. Well, estimate it.

A. About two or three weeks we stayed with him, until he got entirely well.

Q. And then where did you go?

A. Then we went back to Portland.

Q. And stayed there?           A. That's right.

Mr. Greenough: No further examination.

#### Recross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, to fix the time of this dinner, wasn't that [77] the time you had the dinner with the Jahnkes, after you came back with Henry from Portland?

Mr. Greenough: I think she testified she had dinner there on two occasions.

Q. All right; did you have one dinner when you came back with Henry on Decoration Day?

A. No, we didn't have Henry with us. We came alone, because he said "I'm going to call Mr. and Mrs. Jahnke up and tell them that you folks are here," and then she came down the next day and invited us to dinner.

Mr. Brooke: That's all.

(Whereupon, there being no further questions, the witness was excused.)

FLOYD J. UNDERWOOD

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

Direct Examination

By Mr. Greenough:

Q. Your name is Floyd J. Underwood?

A. Yes, sir.

Q. And you're a member of the bar of the state of Washington, and a member of this bar?

A. Yes, sir.

Q. And you reside and conduct your main practice at Davenport, Washington? A. Yes, sir.

Q. And you are the Floyd Underwood who prepared the wills of [78] Henry Kucks which have been admitted here in evidence? A. Yes, sir.

Q. And you acted as his attorney during his lifetime, at least from some time antecedent to the time you prepared the first of those wills? Your first employment was, I believe, when he employed you to probate his deceased wife's estate?

A. The first employment I had from Mr. Kucks was when he employed me to probate the estate of Ida Kucks, his first wife.

The Court: When was that, about?

A. Why, your Honor, it was about in the neighborhood of '43, I believe, your Honor. I can't offhand recall the date.

The Court: Well, I don't care for the exact date. I just wanted to know the year.

A. He didn't probate Ida's estate for some time

(Testimony of Floyd J. Underwood.)

after her death; a period of about three or four months elapsed before he commenced it, your Honor.

Q. You are aware, Mr. Underwood, that in addition to the estate that Mr. Kucks left in the state of Washington, he did leave some land which he owned in Canada?

A. You mean at the time of his death?

Q. Yes.

A. He did not own any land in Canada at the time of his death. Well, I'll qualify it by making this statement, if I may; [79] Mr. Kucks prior to 1946 had owned some land in Canada, and he entered into an oral agreement, the contract I don't believe was ever signed, for the sale of that land, and then in 1949, I believe it is, he entered into a written contract for the sale of that land which was in effect as of the date of his death, so he owned the land. It was subject to this contract of sale, and I do not believe it was in escrow, your Honor.

Q. Did you know the extent of that land?

A. I believe it was a half section of land. I believe that's right.

Q. And situated in the province of Alberta?

A. Well, I wouldn't say for sure, Joe. I could look at my file if you'd care for me to verify it, but it's, I believe, in Alberta.

Q. Well, it was wheat land, was it not, generally farmed for wheat in western Canada some place?

A. That's right.

Q. Miss Hardin, will you hand me plaintiff's

(Testimony of Floyd J. Underwood.)

exhibit number 4, please? Mr. Underwood, I am inviting your attention to plaintiff's exhibit number 4, which is a will of Henry Kucks to which is attached an envelope. Are you familiar with that exhibit?       A. Yes.

Q. You prepared that will as Mr. Kucks' attorney, did you? [80]       A. I did.

Q. And after its preparation and execution by him you delivered it to him, supplying him the envelope which is attached, in which the will was to be enclosed?       A. I did.

Q. And after Mr. Kucks' death, in the presence of Grover Schlaadt, Sr., you opened a safe deposit box of Mr. Kucks' and in it found that will?

A. That's right.

Q. And you delivered that will to Mr. Grover Schlaadt, saying something to the effect "Here, maybe you'll want to keep this"?

A. That's right.

Q. Did you find in that safe deposit box at that time any wills other than this one?

A. I do not recall——

Q. Do you recall——

A. ——just now, where the original will came from, I mean that is filed in the court down there.

Q. You mean the one that's being probated?

A. That's right.

Q. You don't recall where that came from?

A. I believe it was out of the bank box, but I do not recall.

Mr. Kucks—excuse me. Go ahead.

(Testimony of Floyd J. Underwood.)

The Court: I'm not sure I understood you. You [81] found this one after Henry Kucks' death in his box? A. That's right.

Mr. Greenough: That's exhibit 4, and then he delivered it to Grover Schlaadt, Sr., then I asked Mr. Underwood if he found any other wills in the box at that time, and he says he doesn't remember.

A. Your Honor, I do not recall where the will that is in probate was at the time of Mr. Kucks' death, now, to speak the truth, I mean.

Mr. Greenough: No further questions.

#### Cross-Examination

By Mr. Brooke:

Q. Did you prepare any other wills for Mr. Kucks? A. I did.

Q. And those are plaintiffs' 5, 6, 7 and 8?

A. Well, Mr. Brooke, I can't say for sure as to the numbers of them, from here.

Mr. Greenough: Well, we'll stipulate that that's what he testified in his pretrial deposition. They're all in evidence, and they all bear Mr. Underwood's signature as a witness.

The Court: Was it the last one that was probated in Lincoln County Superior Court, that is, the one of August 27, 1949?

A. That's the last one. The second one I prepared for him on the 11th day of February immediately following [82] Catherina's death and immedi-

(Testimony of Floyd J. Underwood.)

ately following the closing of her estate in Lincoln County, Washington.

Q. Now, at the time you prepared the first will, which is exhibit 4, did you have any conversation with the decedent?           A. This will?

Q. Yes.           A. Yes, sir.

Q. And who was present?           A. Mr. Kucks.

Q. Anyone else?

A. Not at the first time that I talked to him about it, no.

Q. When it was executed who was present?

A. Why, Mr. Kucks, Mr. John Henry Kucks; Catherina Kucks; myself; and my two secretaries, Amy Loughben and Lois McKee.

Q. What conversation if any did you have with Henry Kucks about preparing that will?

Mr. Greenough: Now, if your Honor please, I object to this as not proper cross-examination.

The Court: Well, I don't believe it is.

Mr. Greenough: All I did with the witness was establish the fact that when he opened the safe deposit box this exhibit 4 in the envelope was found in there, and that Mr. Underwood gave it to Grover Schlaadt, Sr., and I attempted to establish the fact that was the only [83] will found in the box, but his memory was blank, and that's as far as I went with him.

The Court: I don't believe it is proper cross-examination.

Q. You don't recall where you got the will that is being probated at this time in Lincoln County?

(Testimony of Floyd J. Underwood.)

A. I can't recall definitely, Mr. Brooke, right here, just where that will came from, whether I had it in my safe or whether it was in the box or where it was.

Q. I see.

A. I can't tell you definitely.

Q. Did he have a safety deposit box at that time?

A. He had a safety deposit box in the bank, and when the wills were made out he took them with him.

Mr. Brooke: That's all.

A. That is, generally speaking.

Mr. Brooke: I see. That's all.

Mr. Greenough: No further examination, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

### NEVA SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenough:

Q. Your name is Neva Schlaadt?

A. That's right. [84]

Q. And you are the wife of Grover Schlaadt, Jr.?

A. Yes.

Q. And Grover Schlaadt, Jr., is the son of



(Testimony of Neva Schlaadt.)

Grover Schlaadt, Sr., who is a plaintiff in this action?

A. Yes.

Q. Where do you reside, Mrs. Schlaadt?

A. In Portland, Oregon.

Q. With your husband? A. Yes.

Q. And what is your address?

A. 5224 Southeast 92nd Street.

Q. Did you reside there in 1944?

A. No, we lived on Yukon Street, in the city of Portland, though.

Q. In 1944? A. Yes.

Q. And when you lived on Yukon Street in 1944 you and your husband were residing together?

A. Yes.

Q. Do you and your husband have any children?

A. Yes, we have a son.

Q. How old? A. Seventeen years old.

Q. And in 1944 did your son reside with you in Portland? A. Yes. [85]

Q. And had you resided in Portland during your married life? A. Well, most of it.

Q. Well, when you say most of it—

A. Well, with the exception of about a year or so in 1940 and 1941, but the rest of the time we had lived in Portland.

Q. And all during that time that you had this son who is now seventeen, the son live with you?

A. Yes.

Q. I'm going to put a question to you somewhat out of order, but I'm afraid I might forget it. You were of course acquainted with Henry Kucks?

(Testimony of Neva Schlaadt.)

A. Yes.

Q. Did you ever see him read English?

A. No.

Q. Did you ever see write English?

A. No, I never.

Q. He was German by descent, was he not?

A. Yes.

Q. And he wrote and read German?

A. Well, I couldn't say. I never seen him do either.

Q. Can you, yourself? A. No.

Q. Now, inviting your attention, Mrs. Schlaadt, to the year 1944 and particularly to the month of June and the months [86] immediately following June of that year, you recall, do you, that Catherina Schlaadt was married to Henry Kucks? You recall a marriage occurring between them?

A. Oh, yes.

Q. Now, prior to that marriage, did you have any conversations with Catherina concerning her forthcoming marriage? A. Yes.

Q. Will you tell the Court, please, what was said between her and you on that subject at that time?

A. Yes.

Mr. Brooke: Now, just a moment; I presume it's understood that my objection of the former witness along this line will stand as to this witness also.

The Court: Yes, I think the record should show your objection, and it will be overruled. Proceed.

(Testimony of Neva Schlaadt.)

Mr. Greenough: Will you read the last question?

(Last previous question read by the reporter.)

A. Pardon me, I didn't get that.

Q. Well, maybe you're a little bit off the track here. You have testified that prior to Catherina's marriage to Henry Kucks——

A. Yes.

Q. ——you had some conversation with her in which she made some statements concerning her forthcoming marriage to Henry Kucks. [87]

A. Yes.

Q. Now I'm asking you, what did she say in that conversation?

A. Well, she told us that Henry——

Q. Who is "us"?

A. My husband and I; Grover, Junior.

Q. Maybe we'd better fix the time and place as accurately as we may of that conversation. Where did it occur?

A. Well, it occurred in Grandma's house.

Q. At Catherina's house?

A. Yes, that's right.

Q. And who was present?

A. Well, my husband, Grover, Junior, and I, and Grandma.

Q. Can you fix the time with reference to her marriage, for example, how long before her marriage?

A. Well, she had already accepted the proposal.

(Testimony of Neva Schlaadt.)

That was between the proposal and the wedding day.

Q. All right. What did she say to you and your husband?

A. She told us the proposition that Henry had made her.

Q. What did she say that proposition was?

A. Well, she said that Henry had promised to leave his estate to her two boys if she would marry him.

Q. Go ahead. What else did she say?

A. And so she then said, "You know, I'm thinking about my kids." She said, "What do you think about us getting married?" Of course, she was just asking Grover and I [88] our opinion of her marrying him. Well, we told her that was up to her, that she had known him a long time, and that was her decision to make. Well, she said that she was looking out for her kids, that was the main thing.

The Court: Pardon me, but I thought I heard you say your husband Grover, Junior, was present, and also Grandpa.

A. No, Grandma.

Q. By "Grandma" you mean Catherina?

A. That's right.

The Court: Oh, you meant Mrs. Schlaadt?

A. Yes.

Q. Did she make any statement to you with reference to her confidence in Henry Kucks?

A. Yes, she said she thought he was a man of

(Testimony of Neva Schlaadt.)

honesty, that she could trust what he said, that she was taking his word for it on that proposal of the marriage.

Q. Did she say anything to you at that time which indicated she intended to or had accepted his proposal?

A. Yes, she had already accepted his proposal at that time.

Q. Was she wearing an engagement ring at that time? A. That I don't recall.

Q. But she told you she had accepted the offer?

A. Yes.

Q. Now, subsequent to the marriage did you have any conversation [89] with Henry Kucks concerning his marriage to as you call her, Grandma, that is, Catherina? A. No.

Q. This is after the marriage.

A. We hadn't talked to Henry before the marriage, not until the wedding day.

Q. Maybe you don't understand the word subsequent. After the marriage had been performed, was there any occasion upon which you had conversation with Henry Kucks about the marriage?

A. Yes, the evening of the wedding.

Q. Where did that conversation occur?

A. That was at Grandma's house while dinner was being prepared, that was the wedding dinner.

Q. That was the wedding dinner, you say?

A. Yes.

Q. Now, who was present at that conversation?

A. Well, Grover, Junior, my husband, and I, and

(Testimony of Neva Schlaadt.)

Henry were sitting on the front porch. We were just kidding him along and asking him what he thought of his new bride, and then he told us he had known Kate for a good many years, and that he was sure they would be happy, and he said, "You know, I promised Katie if she would marry me that I would see that her two boys would be left my estate." [90]

Q. You say just the three of you were present on the front porch at that time; there were other members present at the house, were there, other people?

A. Yes, they were preparing dinner in the inside of the house.

Q. Do you recall who they were?

A. Yes, there was my mother-in-law and father-in-law, and Grandma, and then our son. Well, Henry and us was on the porch.

Q. Now, subsequent to that occasion upon the front porch of your Grandma's house, did you have any conversation with Henry Kucks concerning his marriage to Grover, Junior's mother, or grandmother, I should say?

A. No, not before the wedding.

Q. Before they went back to Davenport?

A. No, we didn't see Henry until the wedding day.

Q. I'm talking now, Mrs. Schlaadt, subsequent or after the wedding day, after the wedding and after this occasion upon the porch. You've testified that the wedding occurred. That evening after the wed-

(Testimony of Neva Schlaadt.)

ding there was a party at Grandma's house. Now, after that.

A. Oh, yes; well, we had them out to our house for dinner a couple of nights after that.

Q. Now, "we" is who? You and your husband?

A. Yes, and then he again, after dinner was over we was [91] sitting around talking, he again repeated this same story about the proposition that he had made Grandma in order to talk her into marrying him.

Q. Now, on these occasions, on this occasion, for example, at dinner at your house, was that subject brought up—by whom was that subject brought up, the subject of the marriage and what the terms were?

A. Henry brought it up himself; he seemed to be quite happy over the situation, and wanted to talk about it. He was the one that brought up this subject himself.

Q. Now, did you ever visit Catherina and Henry at Davenport after the marriage?

A. Yes, we did.

Q. When was that?

A. In '45, over Decoration Day.

Q. On Decoration Day of '45?

A. I mean Labor Day.

Q. Who was at Henry Kucks' home at that time when you visited him?

A. Well, my mother-in-law and father-in-law was there, they had gone there a few days before we

(Testimony of Neva Schlaadt.)

arrived, and then Grandma and Henry, and then my husband and I and our son.

Q. Was there any conversation at that time concerning the marriage?

A. Well, I don't recall any. [92]

Q. What was Henry's attitude toward you and your husband at that time?

A. He treated us very lovely, took us to Grand Coulee, and when we left, he gave us eggs, and gave us \$10.00 to help out on our expenses home, and cried when we left, and wanted us to come back any time to see him.

Q. Now, in 1941 I think there was an incident, an occasion when Ida, that was Henry's first wife, Henry and Ida visited you or at least were in Portland and you went shopping with them?

A. That's right.

Q. Tell the Court what happened on that occasion with respect to the luncheon that you had.

A. Well, after we did a little shopping we went and had lunch. At that time Henry or Ida, **his former wife**, neither one could read, and they had me read the menu to them.

Q. And being in Portland, Oregon, I assume the menu was written in the English language?

A. That's correct.

Mr. Greenough: No further examination.

#### Cross-Examination

By Mr. Brooke:

Q. Mrs. Schlaadt, was that the first time you met Mr. Kueks? A. In 1941, yes.



(Testimony of Neva Schlaadt.)

Q. And when is the next time you saw him? [93]

A. Well, I couldn't say that. They made, oh, maybe a couple of trips down to see Grandma, he and his former wife Ida.

Q. And how soon was this before the wedding that you heard him make this—or that Mrs. Schlaadt told you about the proposition?

A. Well, it was between the time that she had accepted his marriage, and the time that they were married.

Q. She had already accepted? A. Yes.

Q. And the sole proposition was that if she would marry him he would leave his property to the two boys? A. Yes, that's right.

Q. And did he say how it would be divided?

A. No, he didn't tell us that.

Q. And that was the entire agreement, was it, Mrs. Schlaadt? A. Yes.

Q. And then once again you heard that same—

Mr. Greenough: We'll stipulate, if your Honor please, that's all we claim, that was his offer, that he would leave his property upon his death to the two boys, and didn't specify in that offer any mode of division between the two of them; that's stipulated.

Mr. Brooke: Then you're stipulating also that the sole consideration was her promise to marry him? [94]

Mr. Greenough: Her marriage to him.

Mr. Brooke: Yes. Are you stipulating that, too?

(Testimony of Neva Schlaadt.)

Mr. Greenough: Well, her marriage to him, and the attendant circumstances, that she left Portland, Oregon, in a comfortable home and happy circumstances and went up to a comparatively strange community; all that follows necessarily her marriage. We'll stipulate that.

The Court: I think you may as well proceed with the testimony.

Q. (By Mr. Brooke): Then the only other occasion was when he was at your house for dinner?

A. That he made the statement to us?

Q. Yes. A. Yes.

Q. And how did that happen to come out?

A. Well, we just got sitting around talking after dinner, and he brought it up himself. He seemed to kind of want to talk about it, for some reason or other.

Q. And he used the identical language that your grandmother had? A. Well, the same thing.

Q. He said if she would marry him, why, he would leave the property to the two boys, is that right? A. That's right.

Q. And that matter wasn't discussed when you were up in [95] Davenport? A. No.

Q. How long were you up in Davenport?

A. We were only there about a couple or three days. It was just over Labor Day.

Q. And where did you stay?

A. At Henry's home.

Q. He didn't discuss any of his financial affairs with you, did he? A. No; not at that time.

(Testimony of Neva Schlaadt.)

Q. And when he was down in Portalnd he didn't mention any of his financial affairs?

Mr. Greenough: On what occasion, please, Mr. Brooke?

Mr. Brooke: About the time of the wedding, the day before the wedding.

Mr. Greenough: And I think the term "financial affairs" might confuse the witness. Do you mean how much he was worth?

Q. (By Mr. Brooke): Well, did he discuss anything except this contract you referred to, or this proposition?

A. Well, he mentioned his estate, but outside of that he didn't state just what things were. He said his estate, his property.

Q. His estate, that's right. That's all. [96]

The Court: Any other questions of this witness?

Mr. Greenough: None, your Honor.

(Whereupon, there being no further questions, the witness was excused.)

### GARFIELD SCHLAADT

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenough:

Q. State your name, please, Mr. Schlaadt.

A. Garfield Schlaadt.

Q. Where do you reside?

(Testimony of Garfield Schlaadt.)

A. San Francisco California.

Q. How long have you resided there, Mr. Schlaadt?

A. I believe since 1923, 1922 or 1923. I think I went down there in March, 1923.

Q. That's close enough. Are you married?

A. I am.

Q. And what is your wife's name?

A. Anastasia.

Q. Is she in the courtroom here, incidentally?

A. She is.

Q. How long have you been married?

A. Since 1929.

Q. Is your marriage to your present wife your only marriage?           A. It is.

Q. Is it her only marriage? [97]           A. It is.

Q. Do you have children, Mr. Schlaadt?

A. We have an adopted daughter.

Q. How old is your adopted daughter?

A. Twenty.

Q. Were you acquainted with Henry Schlaadt, or excuse me, Henry Kucks?           A. I was.

Q. Where did you meet him, first, Mr. Schlaadt?

A. It was on his return from the East, the St. Louis Exposition. Returning to Davenport, he stopped off and visited us at Helena, Montana.

Q. You lived in Helena at that time?

A. Yes.

Q. That is, you lived there along with Grover, your brother, and your mother and father?

A. Yes.

(Testimony of Garfield Schlaadt.)

Q. It was the family home at that time?

A. Yes.

Q. That was when, 1904? A. 1904.

Q. Now, did you later, after your initial meeting with him in 1904 in Helena, did you have occasion to be with him for periods of a day or two at a time, something of that sort? [98] A. Yes.

Q. What was the first of those periods following 1904?

A. 1909, the Alaskan-Yukon Exposition. A group of us were out there, including my grandmother, Henry Kucks, his deceased wife, Ida, my uncle John, and a hired man that worked for my uncle and grandmother. I believe that's all.

Q. You all went to the exposition in Seattle together? A. That's right.

Q. That is, you folks started from Helena, and you picked up Henry at Davenport?

A. I couldn't say just where we picked them up, but we did all come back the same time.

Q. You stayed together, the two families were more or less the same party during the time that you were in Seattle at the Alaska-Yukon Exposition?

A. That's right.

Q. Then following that——

The Court: When was that, in 1910?

A. 1909, I believe, your Honor.

Q. Then what was the next occasion of your spending any time of a day or so with Henry?

A. I enlisted in the service in the first World

(Testimony of Garfield Schlaadt.)

War in December, 1917, and I was at Fort Wright for a period of two months.

Q. You enlisted at Fort Wright? [99]

A. I enlisted at Fort Wright.

Q. You came from Helena to Fort Wright?

A. And I enlisted, and I was there for a period of about two months, and in that period Henry Kucks took the time and effort to look me up at the Fort Wright, and he contacted me out there, and I happened to be on K.P., and he says "Could you get off?" Well, I said "I don't know"——

Mr. Brooke: Just a moment.

Q. Well, you did get off K.P. through the grace of your commanding officer, and he took you to dinner that night?

A. That's right. We came to town that afternoon. We went to a show. After the show we had dinner. After the dinner we went up to his hotel room where we had a few drinks. I stayed with him that entire evening, spent the night with him at the hotel.

Mr. Brooke: Just a moment. Your Honor, this is very interesting, but I don't think it proves any material issue, and furthermore I think it violates section 1211, and I don't want to be precluded by waiving the statute by sitting silent.

Mr. Greenough: I hadn't thought of 1211 because it didn't seem so important.

Mr. Brooke: He's a party to this action.

Mr. Greenough: It's only offered for the purpose of showing that when Henry Kucks made this

(Testimony of Garfield Schlaadt.)

offer to [100] Catherina Kucks which would benefit her sons, that he wasn't benefiting two entirely unknown persons; he had known these boys for a long time. That's the only offer, and perhaps it is violating section 1211.

The Court: I'll let it stand. If the transaction of having drinks together comes within the statute, it isn't one of the issues here.

A. And during the course of the evening, that was the afternoon I think, we attended the show, I spent the evening with him, stayed overnight in the hotel, and when I went back to the Fort in the morning he says, "Garfie, I haven't much money with me," but he says "I'll give you all I have, leaving me just enough to get back to Davenport," and he gave me somewheres in the neighborhood of \$15.00.

Q. Now then, after the first war was over did you see Mr. Henry Kucks again?

A. When I was discharged in July of 1919 I went to visit my mother and father in Portland, and on my return to Montana I stopped off in Davenport by the wishes of Henry Kucks.

Q. He had requested you to stop?

A. Yes, he asked me to stop off, and I visited him there several days. We made a trip through the Coeur d'Alene country by automobile to inspect some of his farm land; he had half an orchard there, I believe it was five acres, and we made quite a tour of that territory at that time, [101] and on another occasion we made a trip in Lincoln County

(Testimony of Garfield Schlaadt.)

to visit these farmers. He seemed to be well liked among all of them.

Q. Did he make any request of you on that occasion?

A. Yes, he did. He says "What are you going back to Montana for? Why don't you stay here with me?"

Q. Did he and Ida, his first wife, have any children?

A. Not born to them, no.

Q. So that when he made this request that you stay there at his place, he had no children of his own staying there?

A. That was just Henry and Ida.

Q. Now, did you have a visit with him during 1946?

A. That was—we made a trip up there, I believe it was in 1946. We drove up. That was after mother's death. We called on him. Mother died in January, I believe it was, and we went up there in August of that year and we stayed there about three days.

Q. Mr. Schlaadt, did you ever see Henry Kucks read the English language?

A. No, I never did. Matter of fact, when we were in the show, it was silent movies those days, and between the scenes—

Q. "Those days"; when was that, now?

A. In 1917.

Q. This is the occasion when he took you to the movie, when [102] you were in the army?

A. Yes, and between the scenes when they flashed



(Testimony of Garfield Schlaadt.)

the words on the screen I had to read it to him so he could follow the picture.

Q. Did you ever see him write the English language?      A. No.

Mr. Greenough: No further examination.

Mr. Brooke: No questions.

(Whereupon, there being no further questions, the witness was excused.)

### GROVER SCHLAADT, JR.

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Greenough:

Q. Grover, your name is Grover Schlaadt, Jr., and you're the son of Grover Schlaadt, Sr., one of the plaintiffs in this case?      A. Yes, sir.

Q. And Neva Schlaadt, who testified as the second preceding witness, is your wife?

A. Yes, sir.

Q. And you heard her testimony as to the fact of your residence in Portland, and the various addresses, the two addresses, where you have resided there?      A. Yes.

Q. And the fact you have a son seventeen years old who up to [103] 1944, through that year at least, resided with you in Portland?      A. Yes, sir.

Q. And that testimony is all correct, is it?

A. It is.

(Testimony of Grover Schlaadt, Jr.)

Q. How old are you, Grover? A. 39.

Q. Do you recall the occasion of the marriage of your grandmother Catherina Schlaadt to Henry Kucks? A. I do.

Q. Now, prior to that marriage was there any occasion upon which Catherina talked with you concerning the forthcoming marriage? A. Yes.

Q. What was that occasion, Mr. Schlaadt?

A. Well, it was an occasion just previous to the marriage, after she had returned from Davenport, having accepted Henry's proposal.

Q. And where did the conversation occur?

A. At her home on View Point.

Mr. Brooke: I don't know whether it's necessary for me to make an objection to this witness.

Mr. Greenough: No.

Mr. Brooke: I don't want to overlook anything.

The Court: I think it's a wise precaution to have [104] the record show that you object to this line of testimony for the reasons you've given, and I'll rule upon it for the reasons discussed before, and overrule the objection.

Q. (By Mr. Greenough): Where did that discussion occur?

A. In her home on View Point Terrace in Portland.

Q. In Catherina's home? A. Yes.

Q. Who was present at that time?

A. My grandmother, my wife, my son, and myself.

Q. Your grandmother is Catherina Schlaadt?

(Testimony of Grover Schlaadt, Jr.)

A. Yes.

Q. Your son was there too, was he?

A. Yes.

Q. He's seventeen now?           A. Yes.

Q. Now, tell the Court, Grover, as well as you can recall, what was said by Catherina on that occasion?

A. Well, she had just returned, said she had accepted Henry's proposal, and that she knew him to be an honest, upright man, he would keep his promise, and that after they were married, why, he would fix it so that should anything happen to him, why, the property that he had would go to her boys, because he didn't have anyone in the world to leave it to, he was more or less an orphan.

Q. Did she say anything as to the reason she was accepting [105] his proposal?

A. She said——

Mr. Brooke: Just a minute; I'm going to object to that on the further ground that her reasons for accepting it are immaterial.

Mr. Greenough: I think not.

The Court: I'll overrule the objection and accept it on the same basis as the other, as showing her state of mind.

Mr. Greenough: Showing the reason for her marriage?

A. Well, she had a nice home and a lot of friends, and the reason I believe that she——

The Court: I think we're getting into the witness' ideas now.

(Testimony of Grover Schlaadt, Jr.)

Q. What did she give as her reason for deciding to accept his marriage proposal?

A. The fact that he said he would turn over his estate to her boys after their marriage, and his decease.

Q. Did you attend the marriage? A. No.

Q. Subsequent to the marriage what was the first occasion upon which you saw Henry Kucks?

A. The night or the evening after the marriage, the evening after the day after the marriage.

Q. Well, was it the same day as the marriage? [106] A. It was the same day.

Q. That evening? A. Yes.

Q. Where did you see him?

A. At Grandma's home on View Point Terrace.

Q. And what was the occasion of your seeing him there?

A. It was a marriage dinner, a celebration of their marriage.

Q. Who was present at that marriage dinner?

A. My father, my mother, my grandmother, Henry Kucks, my wife, my son, and myself.

Q. And on that occasion was there anything said to you or in your presence by Henry as to the arrangements under which he had married your mother, or your grandmother, that is?

A. Yes. When we came to the house, Henry, my wife and I were out on the porch at some time during the evening, and he greeted us and he said that he and Katie had known each other a long time, he

(Testimony of Grover Schlaadt, Jr.)

said of course there wasn't too much love at their age, but that he had a lot of property, that he didn't have anyone to leave it to, but the proposition was if the two of them would get married, why, he would leave his property ultimately to her boys.

Q. Did he say anything about the thought that the arrangement would be compatible and happy for him and Katie both?

A. Yes, he did. He said he had known her ever since she was [107] a child.

Q. Now, you say this was when you and your wife and Henry were on the front porch. Was there anyone else present at that particular time?

A. No.

Q. Where was the rest of the party?

A. The rest of the family was in the house preparing dinner, or in the house, at least.

Q. Now, subsequent to that wedding dinner party, Mr. Schlaadt, did you have another occasion upon which there was conversation by Mr. Kueks as to his marriage with Catherina?      A. Yes.

Q. When was that?

A. One or some days later they came out to our home on Yukon Street in southeast Portland, in the city of Portland, and had dinner with us.

Q. And when you say "they," you mean Catherina and Henry?      A. Yes.

Q. And did they come at the invitation of yourself and your wife?      A. Yes.

(Testimony of Grover Schlaadt, Jr.)

Q. What was said on that occasion by Henry along the subject of his marriage to Catherina?

A. He seemed to be happy—

Q. Not what he seemed to be. What did he say? [108]

A. He said he was happy with the marriage, he had known my grandmother for many years, and he reiterated one of the prime reasons they got married was so he could leave his property to their boys. He had no other children. He had no one.

Q. Did you visit Catherina and Henry in Davenport after they moved up there? A. Yes.

Q. When was that?

A. In the vicinity of Labor Day, 1945.

Q. Do you recall any conversation on that occasion by Henry as to the marriage arrangement?

A. I don't recall any.

Q. What was his attitude towards you and your wife on that occasion?

A. He was very friendly to us, and treated us just like a real grandfather would, and when we left, he gave us a whole basket of eggs, many dozen, and he gave me a ten dollar bill, which I didn't want to accept, but Henry wasn't the kind of man you could say no to without making him mad, so I did take the money, and he didn't want us to go, he wanted us to stay longer.

Q. Now, you mentioned to me, this might not be an exactly proper procedure, your Honor and counsel, but you mentioned to me one occasion upon

(Testimony of Grover Schlaadt, Jr.)

which Henry had occasion [109] to introduce you to the sheriff of Lincoln County, and I've forgotten just when it was. Would you tell the Court about that?

A. Well, we were notified of Grandma's death around the 10th of January, or such, and it was quite cold weather, and as we were coming across the highway from Ritzville——

Q. Who is "we," incidentally?

A. My wife, my son, my brother and myself.

Q. All right.

A. We had a little fender scraping where some farmers had stopped to cross a fence, and I scratched his fender because of the road conditions being slippery and quite snowy, and when we got to Davenport I said to Henry, "I'd better go up and report this to the local authorities," because I didn't want to leave an accident unreported, besides I thought I might get the fender fixed, but we went to the county courthouse, it was either the sheriff or one of the county officials, and Henry introduced me to this gentleman as his grandson, and I reported the accident at that time. I never heard of it after that, though.

Mr. Greenough: No further examination.

### Cross-Examination

By Mr. Brooke:

Q. What year was that, Mr. Schlaadt?

A. That was the year that my grandmother died. [110]

(Testimony of Grover Schlaadt, Jr.)

Q. In 1945? A. 1946.

Q. January, 1946? A. Yes.

Q. And what was Henry's mental condition at that time?

A. Well, he was a man of around 83 years old, and I thought his mental condition was very good.

Q. He was still looking after his business affairs, wasn't he? A. I believe he was.

Q. And in your opinion he was capable of doing that? A. I think so.

Q. And what was his physical condition at that time?

A. Well, he didn't complain to me. I couldn't say as to his exact physical condition.

Q. And he was pretty well—he had a mind of his own, didn't he? A. I would say he did.

Q. In other words, if he wanted to give you that ten dollar bill, why, you had to take it, was that about the size of it? A. Yes.

Q. Now then, how many times did you see him down in Portland? A. How many times?

Q. Yes. [111]

A. From what period to what?

Q. At the time he married your grandmother.

A. To my knowledge, two times.

Q. And both times you saw him, why, he brought up the fact and made the statement that your grandmother had promised to marry him, and in consideration of that he agreed to leave his estate to the two boys? A. Yes.



(Testimony of Grover Schlaadt, Jr.)

Q. And how did that statement happen to come up, or that conversation happen to come up?

A. It seemed to be voluntary on his part.

Q. And the first time that statement came up he was not present, was he? That was after your grandmother had returned from Davenport.

A. He wasn't present then.

Q. No, he wasn't present during that conversation.

Mr. Greenough: Well, now, just a minute——

A. That was previous to the marriage.

Mr. Greenough: The question was, if your Honor please, his previous question was that on two occasions during Henry's marriage trip to Portland, this witness had conversation with Henry about the marriage.

The Court: Yes, I know. Mr. Brooke is talking now about the conversation with Mrs. Schlaadt when he wasn't present. Is that correct? [112]

Mr. Brooke: That's right.

Q. (By Mr. Brooke): In other words, there was one conversation with Henry the day after the marriage, and then another time out at your house; right?

A. One time the day of the marriage.

Q. The day of the marriage. Where did that take place?

A. At my grandmother's home, on the front porch.

Q. Was that after the marriage?

A. Yes, it was the evening of the day of the marriage.

(Testimony of Grover Schlaadt, Jr.)

The Court: You mean the conversation was on the front porch, not the marriage. It was a little doubtful.

Q. Did he make any statement as to how he was going to divide that between the boys?

A. He made no statement of that type to me.

Q. You knew he had a daughter? A. Who?

Q. You knew your grandmother had a daughter, did you not? A. Yes.

Q. Was anything said about her at any time?

A. Not to my knowledge.

Q. You and your wife have discussed what your testimony would be in this case, I presume, haven't you?

A. I don't quite understand the question.

Q. You've discussed this case on numerous times, have you not, since Mr. Kucks died? [113]

A. Yes.

Q. And your testimony is substantially the same as your wife's, is it not? A. Yes.

Mr. Brooke: I think that's all.

### Redirect Examination

By Mr. Greenough:

Q. I might ask you one question. You and your wife discussed this case with me and Mr. Kizer yesterday morning in our office, did you not?

A. Yes, sir.

Q. And we went over what you were able to testify, with you? A. Yes.

(Testimony of Grover Schlaadt, Jr.)

Q. And again this morning in probably a twenty or thirty minute period you went over with me individually what you were going to be able to testify?

A. Yes, sir.

Q. And your wife did likewise?

A. Yes, sir.

Q. And all the rest of the witnesses we've called here today did likewise?      A. Yes, sir.

Mr. Greenough: All right, no further questions.

(Whereupon, there being no further questions, the witness was excused.)

Mr. Greenough: We have no further witnesses, your [114] Honor. We rest our case.

The Court: I had intended to adjourn at 4:30 and I have your memoranda that I think pretty well set out your position and authorities, and I think it would be wise probably to adjourn and hear your argument in the morning. I presume you wish to question the sufficiency of the evidence?

Mr. Brooke: Yes, I have a motion to make, and I'd like to give one or two more authorities.

The Court: Suppose you state your motion, and then both sides give me any more authorities you have, and I'll hear your arguments in the morning.

Mr. Brooke: At this time, the plaintiff having rested, the defendant moves the court for an order dismissing the complaint upon the ground and for the reasons that the plaintiff has wholly failed to prove the allegations of the complaint by any substantial evidence, and upon the further ground that the testimony conclusively shows that the agreement

relied upon is an oral contract to devise property, which is void under the statute of frauds, because not in writing; second, upon the further ground that the contract is void because it is a contract the sole consideration of which was marriage (citing authorities) and upon the further grounds that the testimony has shown that there was not sufficient performance [115] of this contract to take it out of the statute of frauds. The authorities are listed in here showing that the subsequent marriage of the parties was insufficient performance to take any agreement in consideration of marriage out of the statute, and furthermore, upon the grounds and for the reasons that the making of a will, even though in accordance with the terms of the contract, which we do not agree in this case, is not sufficient part performance to take it out of the statute of frauds.

(Whereupon, at 4:30 o'clock p.m. the Court took a recess in this cause until Tuesday, July 1, 1952, at 10 o'clock a.m.)

Tuesday, July 1, 1952—10 o'Clock A.M.

(All parties present as before, and the trial was resumed.)

Mr. Brooke: In addition to the motion we made at the conclusion of the case last night, I wish to also urge the motion to dismiss on the grounds that the complaint does not state a claim that entitles the plaintiffs to any relief, and I understand such a

motion may be interposed at any time as a general demurrer, or may be argued at any time.

(Argument by counsel for the defendants.) [116]

The Court: I might say before you start, Mr. Kizer, that it is my view that this motion to dismiss interposed at this stage of the trial is in effect a demurrer to the evidence, that is, it questions the sufficiency of the evidence to entitle the plaintiff to relief, and I should think that comparable to the situation when a motion for directed verdict is made, that I would regard the evidence in the light most favorable to the plaintiff, and would not be required to say at this time that the facts that have been established are to the extraordinary degree that is required by the Washington State Supreme Court cases that have been cited here.

Of course, while I'm only expressing a tentative view, a view in the light of the evidence that's been adduced so far, there is this to consider, that if you believe a witness, then his testimony is convincing beyond a reasonable doubt. If you don't believe him, why of course that is a different story, and at this time I credit the testimony of the witnesses here, and I think it finds corroboration in the subsequent conduct of Mr. Kucks. It's true his first will was to the wife, and that she had a daughter, but when we consider that these people were not only not versed or did not have a knowledge of the law or the principles of law involved, but Mr. Kucks didn't read and write the English language, while

he was no doubt a [117] man of good judgment and considerable intelligence, nevertheless it isn't at all unusual that he should, in carrying out a promise of this kind, first make his will to his wife, and then make it out to the two boys in the way that he did.

A thing that appeals to me is that here is a widow woman about, as I recall, 76 years of age. She's been widowed for a good many years. It isn't one of these rebound situations where even an elderly person in the first shock of loneliness and loss takes a companion by marriage by way of relief. She had been widowed for a good many years. She had settled down in a comfortable home in Portland, and had her children and her grandchildren near at hand, so it isn't likely that she would marry an 81 year old man unless there was some inducement other than the romantic considerations that usually lead to marriage. To quote from Hamlet, I think it's apt here, when he was upbraiding his mother for marrying his uncle so soon after his father's death, he said to her, "You cannot call it love, for at your age the heyday of the blood is tamed, it's humble, and waits upon the judgment"; so I think that's the situation here, and just as a matter of common sense and ordinary human experience, it's likely and reasonable that there was some special inducement that led this 76 year old woman in her circumstances to marry Mr. Kucks, so [118] that to that extent I think it corroborates the testimony of these witnesses, which I said I have credited.

Now, I have given this case considerable time; I've had more opportunity to do so than I do in the

case of the ordinary trial. I have read a good many authorities; counsel have been very diligent and very cooperative in the matter of submitting trial briefs and lists of authorities, and I have read all that have been submitted, and I would like to hear the argument on the question of whether this oral contract, which I say at this stage was made, is void or its enforcement barred by the statute of frauds. I thought that this preliminary statement of mine might be helpful in limiting the scope of the argument.

(Argument by counsel for the plaintiffs; further argument by counsel for the defendants.) [119]

#### COURT'S DECISION

The Court: Ordinarily, I think I follow a common practice of Federal judges in that respect, or Federal courts, ordinarily we're hesitant to decide a case on a motion to dismiss at the conclusion of the plaintiff's evidence without having all of the evidence brought in so that if an appeal is taken the higher court can finally decide the case and not have to send it back for a new trial.

It seems to me that there is justification for departing from that usual practice here for two reasons; first, it seems to me that all of the evidence that bears upon this question or court materially bear upon the question of whether the contract was barred by the statute of frauds is now before the Court, and nothing could be added by evidence to be

adduced by the defendants, and another reason is that this very close and I find difficult question is one purely of law which I think is fully ripe and ready for decision at this stage of the case on the facts presented so far, and if it is to be decided by a higher court, it is much to the advantage of the parties and would save them time and expense if the case goes up on a shorter record now than if the case goes up at the conclusion of the trial, when there would be, I presume, substantially more added to the record.

I might say this is one of those cases where I started out with one idea and came out with another. So far as this [120] statute of frauds is concerned and its applicability to this case, or rather its effect on this case, my first impression, and I stayed with it quite a while, was that the statute shouldn't bar enforcement of the contract. My first thought and feeling was that Mrs Schlaadt had done everything she possibly could; that she had carried out fully her part of the agreement, and certainly if the other party didn't carry it out that should be considered sufficient part performance, but I have spent a good many hours examining the authorities, and against my first impression I was obliged to come around the other way.

This case has been very well presented here. I think the Court has been fortunate in having counsel as diligent and able as they have been in this case, and I'm not trying to merely sugar-coat a bitter pill when I say Mr. Kizer has made a very persuasive



and brilliant argument here, and it was almost a marvel to me that he could make so much out of what he had to work with, and I don't see how, and I say this in all sincerity, the case could have been more effectively or more forcefully or more persuasively presented than it has been by both Mr. Kizer and Mr. Greenough.

Now, the thing that struck me as I examined these authorities was, of course, I'll say preliminarily here, of course I find and start with the premise that an oral contract was made in accordance with the testimony of the witnesses. [121] The contract runs counter to two provisions of the statute of frauds of the State of Washington, first, the provision that an agreement made in consideration of marriage is void, except mutual promise to marry, and second, an agreement to convey real property must be in writing. The contract here is unenforceable unless there is some way shown of avoiding these two bars or blocks interposed by the two provisions of the Washington statute of frauds.

In order to avoid that, it has been argued here that there is sufficient performance, there has been sufficient performance, to take the case out of the statute of frauds. Now, the thing that impressed me in looking over the authorities was, and the more diligently I searched and the harder I worked the more firmly I became convinced, that by the weight of authority, where there is a statute that bars the enforcement or renders void an oral contract to make a will devising real property, the great weight of authority is the overwhelming weight of authority, that the mere making of the will is not

sufficient performance to take the case out of the statute. I also became convinced by the weight of authority that where there is a statute such as the statute of Washington which provides that an agreement, made in consideration of marriage shall be void, that the mere consummation of the marriage is not sufficient to take the case out of the statute of frauds, and that is set out in this note in A.L.R., I don't think [122] there's one case to the contrary shown there; at any rate, the weight of authority is shown to be that way, as also set forth in the rule as stated in the Restatement of Contracts, and I'll say, too, that in my examination of the Washington cases, and of course I am bound so far as substantive law is concerned by the law of the state of Washington and by the decisions of the Supreme Court of the state of Washington, this is a diversity case, that is, one in which the jurisdiction of this court depends upon the diversity of citizenship of the parties, and as I believe Justice Frankfurter remarked in a diversity case, a Federal court is sitting in effect as another court of the state, so I decide this case in exactly the same way, or should, following the same rules of law that one of my brother judges in the Superior Court across the river would decide it if it came to them. I am bound by the laws of the state of Washington so far as substantive law is concerned. Now, a careful reading of the decisions of the Supreme Court gives me no reason to believe that the state of Washington is with the minority in either of the lines of decision which I have just discussed.

Now, it's been said that although the marriage

alone may not be sufficient, and making the will alone might not be sufficient, that the two together should be sufficient. Now, I can't get that reasoning, because it doesn't seem to me that those two things logically and reasonably should be used [123] cumulatively to add to each other or the effect of each one separately, for the reason that I think they pertain to different things. The logical basis and the rationale for the doctrine of part performance voiding the statute of frauds, as I understand it, is that where a person has acted in reliance upon the promise of another, and has substantially changed his position to his detriment, where it would be unfair and unequitable to let the other party then renounce and void the contract, that the statute will not be available as a bar to the party who tries to void it. On the other hand, on these contracts that pertain to the conveyance or devise of real property, as I understand it there, the only way in which the making of the will could be used in avoidance of the statute of frauds would be to show that there is performance on the part of the party who is to make the conveyance, and the reason why that is held not to be performance is that a will is ambulatory, it's tentative, it doesn't convey anything. It's been illustrated in this case. How can it be said that Henry Kucks performed this contract when he executed one of these wills? Which one performed it? If a contract is performed it's done, it's through, it's all finished so far as that party is concerned. It's shown here what happens to a will. A will is something we can do today that we can change tomorrow. That's exactly what Henry Kucks did.

When he made this first will, while it doesn't seem to be [124] exactly, certainly, in accordance with the contract, that couldn't be said to be performance, and the will in which he left property to the two sons of Mrs. Schlaadt was only an ambulatory temporary arrangement which could be changed at will, and was changed later on. If Henry Kucks had executed and delivered a deed in which he conveyed this property to these two boys, then we would have had a different consideration, we would have had performance, but we haven't got it, in my judgment, when he merely makes a will, which is only ambulatory.

Now, I notice in many of the cases here, I have found no case in Washington that is squarely in point, but there are some of these mentioned by Mr. Brooke, and I believe that *Aiken v. English* is another one, in which there was, in a case of an oral contract to make a will or convey property in consideration of marriage, that there was both the consummation of the marriage and the making of the conveyance or will, and in those cases it was held nevertheless that there wasn't sufficient part performance to take the case out of the statute of frauds. I'm quite sure that's true in *Aiken v. English*, the Kansas case reported in 289 Pac. 464.

Now, it's true that where there is a contract in consideration of marriage, that if there is other consideration besides the marriage, that it may be sufficient to take the oral contract out of the statute of frauds. Of course, if we just [125] think about it, we can see why the marriage itself would not be

sufficient, because the legislature of the state of Washington and other states where there is the same sort of statute, the legislature in effect has said that for reasons of public policy and because of the fact that some of the parties affected will be out of the way and not able to testify or speak for themselves when the matter is discussed in court, but at any rate, for reasons of public policy, marriage itself shall not be considered a sufficient consideration to validate an oral contract or to make an oral contract based upon it valid. In other words, they've said that if one party promises to do something in consideration of marriage, that the marriage is not sufficient to validate an oral contract. Well, if we say then that it's true that an agreement in consideration of marriage is void, but if the marriage is performed, the very thing that's contemplated by the statute, that takes it out of the statute, it would mean in effect to invalidate the statute in all those cases where the marriage was actually consummated, and that of course is an absurd conclusion, so that there must be something to take the case out of the statute of frauds, something other than the mere consummation of the marriage.

Mr. Kizer argued very persuasively on that point, but when we just coolly and calmly consider the facts in this case, it is difficult, it seems to me, to escape the conclusion that [126] Mrs. Schlaadt made only one promise, she promised to do only one thing, and that was to marry Henry Kucks. That was the testimony, and he promised, assuming that the oral

agreement was made, he promised that if she would marry him, that he would leave his property to her sons. Now, everything that she did, she did enter into the marriage, but everything else that she did was purely incidental to the marriage; it's something that a wife would be expected and be required to do. She left her home and went to live with him. What bride doesn't? She left her son and her relatives and went where he was living, but isn't that the obligation that is ordinarily imposed upon a wife? So that I can't think of anything that she did here other than entering into the marriage that she would not do, or any bride would not do, any wife would not do and be ordinarily obliged to do and presumed to do in carrying out the marriage arrangement.

One of these cases struck me here, while it's not a Washington case, as indicative of how little the courts think of that matter of a wife changing her residence to be with her husband. In this, as I remember it, *Hutnack vs. Hutnack*, or *Hulnack*, at any rate, it's a Rhode Island case that is reported in 81 Atl. 2d 278, in that case the woman was a resident of Europe, and left her home in Europe and came all the way to the United States to live with a man who promised he would do certain things if she married him, and that wasn't considered [127] part performance sufficient to take the case out of the statute of frauds.

Now, it has been argued here that after all, the marriage wasn't the principal consideration here. I think that there are some cases that mention and

say that if the marriage is incidental to some other arrangement that the parties are primarily pre-occupied with and primarily interested and concerned with, that an exception will be made. I think in applying that rule, however, we have to look at the marriage from the standpoint of both the parties, and not just one of them. It may be true that from Mrs. Schlaadt's standpoint, the fact that her sons would get Mr. Kucks' property was more important to her than the marriage, but to Henry Kucks the marriage was the important thing, I assume more important than his leaving the property to the sons, so if we look at it from the standpoint of both the parties, this was a marriage contract, it could be nothing else, that is, an agreement made in consideration of marriage. That is true of practically every one of these cases, that one of the parties probably doesn't regard the marriage as highly as the other from the standpoint merely of what the marriage would bring, without the other considerations. If an elderly wealthy man promises a young woman he will give her a million dollars if she marries him, certainly the marriage may not be important to her, but it is to him. That can be said of practically every one of these [128] cases in which the question arises.

On the matter of fraud, I think I need say very little on that, as I have indicated it is my conclusion, and I can see no other conclusion that could be reached under the testimony, that Henry Kucks when he made the promise made it in good faith, that there was no fraud, no deceit, and the fact

that he did fail to carry out the agreement it seems to me is not sufficient evidence of fraud without something more, so I can't say that the statute of frauds in this case can be avoided on account of any fraud practiced upon Mrs. Schlaadt by Henry Kucks.

Now, in a case of this kind, although it doesn't seem to fit in too well, there is a requirement, as I understand it, that findings of fact be made. I think the matter is governed by rule 41 (b) of the Rules of Civil Procedure, which provides in part that after the plaintiff has completed the presentation of his evidence, the defendant without waiving his right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and law the plaintiff has shown no right to relief, and so forth. If the court renders judgment on the merits against the plaintiff, the court shall make findings as provided in rule 52 (a), which is the finding rule, and I mention that because in the event the case goes to a higher court, it is rather important, I think, to get the findings as I think they should be [129] or at least have them reflect my view of the evidence that's been presented here.

I think I've indicated that I find that the promise was made substantially as testified to by these witnesses, that Henry Kucks promised orally that if Mrs. Schlaadt would marry him, he would leave his property to her two sons. I find that promise was made in good faith and without any intent to



defraud or deceive Mrs. Schlaadt. I think it would be proper to make a finding that the evidence shows here as to the situation of Mrs. Schlaadt that she was living in Portland and had her own home there, and that she did leave her home in Portland and went to live with Henry Kucks in Davenport, Washington, and lived with him there until her death. I don't regard that, however, as a part of the contract, that she was to make any material change in her circumstances. I think simply, that is my view of it, that it was incidental to her marriage, but I have no objection to reciting what her situation was before the marriage was entered into, and then I think too the findings should show the making of these wills, not detailing their contents, but at least referring to them by exhibit number. If there's anything else you're in doubt about so far as the findings are concerned, we can take it up at the time of the settlement of them.

Mr. Kizer: Will it be in order for us to prepare our suggested findings for your Honor's consideration? [130]

The Court: I think that that might be wise.

Mr. Kizer: It seems so, because **in certain respects** you're finding with us, but on the law you're finding against us.

The Court: I think there is rather a peculiar situation here. Since I've found with the plaintiff on the facts and with the defendant on the law, perhaps it might be well for you to prepare your own version of the factual findings, and from that we should be able to work out something that would be acceptable. [131]

## Reporter's Certificate

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, do hereby certify: That at all times herein mentioned I was acting as the official court reporter of the United States District Court for the Eastern District of Washington; that as such reporter I reported in shorthand and transcribed the foregoing proceedings before the Hon. Sam M. Driver, United States District Judge, held at Spokane, Washington, on June 30 and July 1, 1952; that the within and foregoing is a full, accurate and complete transcript of the proceedings had in the above-entitled cause, excepting the argument of counsel.

Dated this 16th day of July, 1952.

/s/ STANLEY D. TAYLOR,  
Official Court Reporter.

[Endorsed]: Filed August 25, 1952. [132]

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[Title of District Court and Cause.]

## CERTIFICATE OF CLERK

United States of America,  
Eastern District of Washington—ss.

I, Stanley D. Taylor, Clerk of the United States District Court for the Eastern District of Washing-

ton, do hereby certify that the documents annexed hereto are the Original

Complaint.

Notice of Motion for Leave to Amend Complaint.

Motion to Dismiss.

Motion for Leave to File Amended Answer.

Amended Answer.

Certified Copy of Clerk's Minute Entry June 27, 1952, re Motion to File Amended Answer.

Court Reporter's Record of Proceedings at the Trial.

Exhibits Admitted in the Trial.

Findings of Fact and Conclusions of Law.

Judgment.

Notice of Appeal.

Cost Bond on Appeal.

Appellants' Designation of Record on Appeal.

Appellees' Designation of Record on Appeal.

on file in the above-entitled cause, and that the same constitute the record for hearing of the Appeal from the Judgment of the United States District Court for the Eastern District of Washington, in the United States Court of Appeals for the Ninth Circuit, as called for by the appellants and the appellees in their designations of record on Appeal.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court, at Spokane, in said District, this 19th day of September, A.D. 1952.

[Seal]

/s/ STANLEY D. TAYLOR,

Clerk of Said District Court.

[Endorsed]: No. 13554. United States Court of Appeals for the Ninth Circuit. Grover C. Schlaadt, Sr., and Garfield Schlaadt, Appellants, vs. Emil Zimmerman and Kate Zimmerman, Husband and Wife; Fred Jahnke and Emma Jahnke, Husband and Wife, and Emil Zimmerman as the Executor of the Last Will and Testament of John Henry Kueks, Deceased, Appellees. Transcript of Record. Appeal from the United States District Court for the Eastern District of Washington, Northern Division.

Filed September 22, 1952.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for  
the Ninth Circuit.

United States Court of Appeals  
for the Ninth Circuit

No. 13554

GROVER C. SCHLAADT, SR., and GARFIELD  
SCHLAADT,

Appellants,

vs.

EMIL ZIMMERMAN and KATE ZIMMERMAN,  
Husband and Wife; FRED JAHNKE and  
EMMA JAHNKE, Husband and Wife, and  
EMIL ZIMMERMAN as the Executor of the  
Last Will and Testament of JOHN HENRY  
KUCKS, Deceased,

Appellees.

STATEMENT OF POINTS

To the above-named appellees and to Messrs.  
Underwood and Campbell, and Hamblen, Gilbert &  
Brooke, your attorneys:

You and each of you are hereby served with  
appellants' statement of points as follows:

1. The court erred in holding that the oral contract between Catherina Schlaadt and John Henry Kucks by the terms of which Kucks agreed to leave his property to appellants in consideration of Catherina Schlaadt's marrying him was void and unenforceable in view of the complete performance of the contract by both parties to it.

2. The court erred in holding that neither the execution of the wills dated May 24, 1945, and Feb-

ruary 11, 1946, respectively, nor the consummation of the marriage of the parties was sufficient part performance of the oral contract to take the same out of the statute of frauds.

3. The court erred in holding that defendants (appellants) were entitled to judgment against plaintiffs (appellees) dismissing this action with prejudice and costs.

4. The court erred in entering judgment on the findings in favor of appellees and against appellants.

Spokane, Washington, September 25, 1952.

/s/ BENJAMIN H. KIZER,

/s/ JOSEPH W. GREENOUGH,  
Attorneys for Appellant.

Receipt of Copy acknowledged.

[Endorsed]: Filed September 27, 1952.